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Mel Kenny

**Exploring the Uncommon Core:
Comparative Analysis of Surety
Agreements across Europe**

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IMPRESSUM

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Abstract

This Article analyses the treatment of suretyship agreements across the EU in the context provided by (1) the extent to which they reveal a ‘common core’ of EC private law; (2) the policy proposition that to stem legal fragmentation legal homogeneity and the assimilation of legal traditions is inevitable; (3) whether the goal of creating a single market in financial services requires a regulatory response whether measures of sector specific EC legislation, maximum harmonisation directives or broader codification. Predictably, given their polycontextural function, we are confronted with starkly divergent national approaches towards such agreements. Adapting Teubner on the hybridisation of contract, the paper proceeds to consider how we may see elements of commonality arising through the tension between differing legal traditions and divergent national approaches. The paper argues that Europe is becoming ever more a mixed jurisdiction, finishing with a prediction of the relevance of a strategy involving both measures of sector-specific harmonisation and a programme of non-legislative harmonisation through judicial convergence.

I. Introduction

This paper looks to describe the treatment of surety agreements across Europe in its wider law and policy context. Faced with a diversity of legal approach the case for harmonising suretyships' law, for codifying private law more generally, or for seeking to create a single market in financial services may appear irresistible. This paper argues that this perception is flawed; that we must allow for diversity in the treatment of suretyships. After setting out the core of discord attention turns to consideration of initiatives aimed at producing greater coherence in the treatment of European Private law disputes. The analysis is divided into four main sections. The paper begins, in placing the treatment of surety agreements in their broader context, by challenging the assumption that a 'common core' of suretyship law exists (Section II). The paper then proceeds to chart the diverse functions of surety agreements (Section III). In the main body of this paper a comparative survey of the national approaches to Suretyship law and the proposals on the treatment of surety agreements made by the Study Group on a European Civil Code (SGECC) is undertaken (Section IV). Finally, some conclusions are drawn which principally aim to (1) chart the fault-lines of legal fragmentation; (2) suggest an alternative analytical approach and; (3) propose the potential significance of a 'mixed' legislative and non-legislative approach (Section V).

II. Context: Law, Policy and Economics

A. Law

By focusing on suretyships we can gain important insights into just how 'common' or 'uncommon' the 'common core' of European private law is. This paper analyses the treatment of non-professional surety agreements: unilateral contracts between non-professional sureties – in favour of family members, friends, and, most frequently, spouses – and creditors. Given the close emotional ties between principal debtor and surety, the surety may not be in a position to decline standing surety. This confronts us with a choice between protecting vulnerable, emotionally dependent sureties, where no amount of pre-contractual information will dissuade the wife from standing surety for her husband,¹ and the countervailing claims of contractual integrity, and the need

1 J. Gernhüber, *Ruinöse Bürgschaften als Folge familiärer Verbundenheit*, (1995) JZ 1086, at 1093: 'Warnings and advice... are only useful where the addressee is prepared to accept them.' (author's translation).

to assert the fundamental freedom to enter into unwise agreements.² Here the limits of the information paradigm, extensively relied upon in the construction of EC secondary law until now, are illuminated.³ As this analysis discloses, whilst suretyships are ‘common’ throughout the EU, the approach taken towards such agreement and the precise location of protective mechanisms varies significantly from one legal system to the next.

B. Policy

Those surveying the debate on the future of European private law, caught between the calls for ‘greater coherence’ and the need for codification on the one hand,⁴ those warning of the dangers of ‘legal fragmentation’ on the other,⁵ and those arguing ‘coherent fragmentation’ in the middle⁶ may well be struck by the aptness of *Teubner’s* picture of the beast of reciprocal misunderstanding in legal communication: the two-headed Janus;⁷ begging the question of whether European private law Jurists are even interested in communication across legal orders in the first place. In this sense the state of debate in EC private law is reminiscent of the all-or-nothing approach to sovereignty which accompanied

2 *Inter alia* Ulster Bank v Fitzgerald, [2001] IEHC 159: para 10: ‘(T)he courts are not required to intervene to protect a contracting party from ill-advised action... the court is not entitled to relieve her (Ms Williams) of her obligations... merely because a more prudent person might not have signed them.’

3 Article 153(1) EC: ‘In order to promote the interests of consumers and to ensure a high level of... protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, *as well as to promoting their rights to information*, education and to organise themselves in order to safeguard their interests.’

4 C. von Bar, *From Principles to Codification: Prospects for European Private law*, (2002) 8 CJEL 379; O. Lando, *Does the European Union need a Civil Code*, (2003) 49 RIW 1, C. von Bar, O. Lando & S. Swan, *Communication on European Contract law: Joint Response of the Commission on European Contract law and the Study Group on a European Civil Code*, (2002) 10 ERPL 183.

5 B. Markesinis, *Why a code is not the best way to advance the cause of European legal unity*, (1997) 5 ERPL 519-524; P. Legrand, *European Legal Systems are not Converging*, (1997) 45 ICLQ 52; P. Legrand, *Against a European Civil Code*, (1997) 60 MLR 44, P. Legrand, *The Impossibility of Legal Transplants*, (2003) 4 MJ 111, *most spectacularly* P. Legrand, *Antivonbar*, (2006) 1 JCL 1.

6 M.W. Hesselink, *The Politics of European Contract Law: Who has an Interest in What Kind of Contract Law for Europe?* (2002) *Global Jurist Frontiers*, Vol. 2, No.1, Art. 3: <http://www.bepress.com/gj/frontiers/vol2/iss1/art3>.

7 G. Teubner, *The two faces of Janus: rethinking Legal Pluralism*, (1992) 13 *Cardozo L. Rev.* 1443, at 1445-48.

the process of European integration itself; expressing the fear that homogeneity, assimilation and the suppression of national legal traditions are the end products as much of European integration in general, as the Europeanisation of private law in particular.⁸ More optimistically, it is possible to think of productive, imaginative and more sophisticated collaboration which need not inevitably point towards the homogenous core of European private law.⁹

C. *Economics*

The economic case against intervention to improve the protection of the vulnerable surety rests on a number of propositions:

- First, that the market is self-sufficient; that it is simply not in the banks' interests to offer 'unfair suretyships' for fear that they will lose market share.
- Second, solvency assessment procedures are objective, proportional and non-discriminatory and are therefore more efficient than legislative regulation.
- Third, banking procedures are reliable; agreements have to be formalised, in the course of which the parties are informed by a notary/solicitor

8 Generally: Z. Bankowski & A. Scott, The European Union and Its Order: The Legal Theory of European Integration (London, Blackwell, 1999). In the context of Europeanisation: H. Collins, Good faith in European Contract law (1994) 14 OJLS 229 at 254: 'Approximation of laws entails both homogeneity of legal forms and eventually assimilation of social values... (T)his requires an abandonment of the common law's style of analogical and pragmatic reasoning... in which the law is developed by elaborate discursive practices rather than deductions from... the delphic utterances of the European Court of Justice. And the assimilation of social values embodied in the law suggests that the common law of contract... designed for a nation of shopkeepers, will eventually have to succumb to a more communitarian ideal which balances the interests of consumers against those of shopkeepers.'

9 S. Weatherill & S. Vogenauer, The European Community's Competence for a comprehensive harmonisation of Contract law – An empirical analysis (2005) 30 ELRev 821 at 826: 'The Commission is provoking a deeply significant debate ranging over culture, economics and constitutional legitimacy.' S. Weatherill, Why object to the Harmonisation of Private law by the EC, (2004) 12 ERPL 633 at 660: 'In taking seriously the vigour of constitutional, cultural and economic objections to harmonisation it is possible for all affected jurists to collaborate in identifying the way forward for a sharing of responsibility in the evolution of a European private law which must be based on perceptions more sophisticated than a mere glorification of harmonisation, just as it must not exaggerate the inviolability of national legal culture and thinking.'

of the risks involved in the transaction.

Yet according to economic logic a single market in financial services should lead to economies of scale and enhanced conditions for growth.¹⁰ Given the differences between Member States' financial services' laws, the Commission has taken the view that improving access and resort to credit, enhancing responsible lending, and further encouraging the active consumer could generate significant growth in the EU. The aim of encouraging the depth, liquidity and dynamism in European financial markets to allow more efficient resource allocation and enhanced competition¹¹ was also an aspect of the European Council's Lisbon strategy.¹² To these ends the Commission proposed the adoption of a new, maximum harmonisation Directive on consumer credit which was to include consumer suretyships.¹³ The Commission's interest in the integration

10 Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, Brussels 11.9.2002, (COM(2002) 443 final) Explanatory Memorandum, Section 1.2. at 3: <http://europa.eu.int/eur-lex>.

11 Green Paper on Financial Services Policy (2005-2010) (COM(2005) 177 final.) at: http://ec.europa.eu/internal_market/finances. Financial Services White Paper 2005-2010: http://ec.europa.eu/internal_market/finances/docs/white_paper. identifying EC objectives of an integrated, open, inclusive, competitive and efficient financial market; removal of the remaining barriers to financial services; high levels of financial stability, consumer protection; deepened relations with other financial marketplaces and globally enhanced European influence.

12 Presidency Conclusions, Lisbon European Council, 23-24 March 2000: <http://ue.eu.int/ueDocs>: 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.'

13 Maximum harmonisation provisions are those prohibitive of more stringent national measures, minimum harmonisation provisions are permissive of more protective national measures. Minimum harmonisation is specified in EC policy areas (i.e. Articles 153 and 176 EC in consumer and environmental protection). Maximum harmonisation may be adopted for market integration purposes (Articles 94 and 95 EC). As the Court of Justice held, Case C-376/98, *Germany v Parliament and Council (Tobacco Advertising)*, [2000] E.C.R. I-8419, maximum harmonisation may not be resorted to opportunistically, para 84: 'if a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions to competition... were sufficient to justify the choice of Article 100a (now 95) as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory.' See: C-210/03, *R v Secretary of State for Health (Swedish Match)*, [2000] ECR I-11893 paras. 26, 30-32, 34 and 68. The Commission's Consumer Policy Strategy sought adoption of maximum harmonisation: 2002-6: COM(2002) 208 final.: <http://ec.europa.eu/consumers>. See, S. Weath-

of the financial services' market can be explained: extrapolating from U.K. levels of secured and unsecured debt, there appeared to be a potential for a European debt market in excess of 13 trillion Euro;¹⁴ indebtedness as a spur to growth was not being fully harnessed. Increasingly, therefore, the question is not whether but how a single financial services' market could be achieved: by piecemeal measures of harmonisation; by more adventurous measures of 'internal market', maximum harmonisation; or by comprehensive codification in a European Civil Code? Moreover, what type of financial services' regulation recommends itself: the Anglo-American model of substantially unregulated financial services¹⁵ or a high level of protection?¹⁶ Alternatively, is the integration of the financial services' market best left to less invasive judicial harmonisation,¹⁷ to a pragmatic competition of legal orders¹⁸ or to the market and spontaneous harmonisation,¹⁹ or best achieved through a mediation of claims

erill, *Cases and Materials on EU Law*, (OUP, 2006), at 617-657. Proposed directive, *Cited above* note 10, Section 3, Explanatory Memorandum emphasising the information paradigm, at 8: 'The directive also covers surety agreements. The harmonisation being sought for these agreements will centre mainly on the information to be provided to consumers concluding such agreements, even if they guarantee credit that is granted for employment-related purposes.'

- 14 In February 2006, U.K. secured lending stood at GBP 981,8 bn. up 10.6% on 2005, consumer credit at GBP 192,6 bn. up 8.7% on 2005, making a total indebtedness of GBP 1.174 trillion. Policy initiatives: <http://www.creditaction.org> and <http://www.debt-on-our-doorstep>.
- 15 C. McCreevy, DG Internal Market, Speech at Centre for European Reform, 'Financial Markets Integration', London, 9 March 2006: http://ec.europa.eu/commission_barroso/mccreevy.
- 16 Article 153 (ex 129a) EC specifies a high level of consumer protection and, simultaneously, resort to measures of minimum harmonisation: (1) In order to promote the interests of consumers and to ensure *a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers...* (3) The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; (b) *measures which support, supplement and monitor the policy pursued by the Member States...* (5) *Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures...* (author's emphasis).
- 17 A. Colombi Ciacchi, Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships, [2005] 13 ERPL 285.
- 18 J.H.M. van Erp, European Private Law: Post-modern Dilemmas and Choices (1999) 3 E.J.C.L. at: <http://www.ejcl.org/31/art31-1.html>.
- 19 A.I. Ogus, Competition between National Legal systems: a Contribution of Economic Analysis to Comparative law (1999) 48 I.C.L.Q. 405.

through a ‘constitutionalisation’ of private law?²⁰ These issues intersect with the debate on whether we need to revise our perception of law to admit that law depends on tension and contradiction; that a multiplicity of systems can work together as a unitary network.

III. Polycontextual Function of Surety Arrangements

The Surety arrangement is frequently only precariously demarcated from other types of guarantees: indemnities, performance bonds, independent or demand guarantees; this being an area of law where there is gradation; where terms and concepts overlap. Rather than clean delineation, a spectrum of guarantees and guarantee protection operates.²¹ Demarcation problems have generated litigation and legislation. This section maps out ‘common’ and ‘uncommon’ elements of the suretyship, describing the complex, atypical relationship between surety and creditor and the resulting polycontextual function of such agreements.

A. *The Common core of Surety agreements*

There is agreement on the general function of the suretyship as a unilateral guarantee of secondary and accessory liability. Given the imbalance of bargaining power and the parties’ proximity, the need to protect the guarantor is similarly a common concern throughout Europe. All European legal orders recognise that inadequate protection could lead to sureties facing over-indebtedness. All Member States have attempted to increase protection where, otherwise, the creditor would have been under no obligation to the surety. A need for broader coherence in the treatment of suretyships has been identified by the Court of Justice and the Commission. Yet surety protection is available in only a few cases: in *Dietzinger* on the basis of the Doorstep Selling Direc-

20 O. Gerstenberg, Private law and the New European Constitutional Settlement (2004) 10 E.L.J. 766. *See also*: A. Colombi Ciacchi, *cited above* note 17.

21 G. McCormack, Protection of surety guarantors in England – prophylactics and procedure, in: A. Colombi Ciacchi (ed.), Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity, (Forthcoming: Baden-Baden, Nomos, 2007). *Also*: A. Colombi Ciacchi, Der Schutz des Bürgen in Europa – Bericht über ein rechtsvergleichendes Forschungsprojekt und seine zweite Jahrestagung (2006) 4 VuR 141.

tive,²² where the Court, ambiguously, held that such contracts as covered by the Directive *could* be understood to include guarantee contracts where the principal contract concerned the supply of goods or services to a consumer.²³ Thus, where guarantees covering consumer credit are entered into outside the trader's premises, they *may* fall within the directive. The surety then enjoys withdrawal rights under the 'cooling-off' period provided for.²⁴ A gap in consumer protection was subsequently recognized in *Berliner Kindl*,²⁵ where it was held that the 1987 Consumer Credit Directive did not cover a suretyship for repayment of credit where neither surety nor debtor was acting in the course of his/her trade or profession. Article 23 of the *Draft Directive on Con-*

22 Case C-45/96, *Bayerische Hypothekenbank v Edgar Dietzinger*, [1998] ECR I-1199. Council Directive 85/577/EEC on contracts negotiated away from business premises, OJ 1985 L 372/31.

23 Case C-45/96, *ibid.* Para. 20: 'In view of the close link between a credit agreement and a guarantee securing its performance and the fact that the person guaranteeing repayment of a debt may either assume joint and several liability for payment of the debt or be the guarantor of its repayment, *it cannot be excluded* that the furnishing of a guarantee falls within the scope of the directive.' Author's emphasis. *See generally*: P. Rott, Consumer Guarantees in the Future Consumer Credit Directive: Mandatory Ban on Consumer Protection? (2005) 13 ERPL 383 at 384.

24 German doorstep 'junk real estate' sales highlight problems in the financial services' due diligence standards: Case C-481/99, *Georg and Helga Heiningen v Bayerische Hypo- und Vereinsbank*, [2001] E.C.R. I-9945; Case C-350/03, *Elisabeth and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG*, [2005] ECR I-9215; Case C-229/04, *Crailsheimer Volksbank eG v Klaus Conrads and others*, [2005] ECR I-9273. P. Rott, Risikohaftung der Banken für 'Schrottimobilien' (2006) 3 GPR 25. P. Rott, Linked Contracts and Doorstep Selling: Casenote on ECJ Judgments of 25 October 2005, Cases C-350/03, *Schulte* and C-299/04, *Crailsheimer Volksbank*, (2006) 1 Yearbook of Consumer Law, 403.

25 Case C-208/98, *Berliner Kindl Brauerei AG*, [2000] ECR I-1741. (Council Directive 87/102/EEC for the approximation of the laws concerning consumer credit, OJ 1987 L372/31.). Paras 25-26: (25) 'Given the objectives of Directive 87/102, on the other hand, which almost entirely concern the information to be given to the principal debtor regarding the implications of his commitment, and bearing in mind the fact that it is almost devoid of provisions that might afford an effective safeguard to the guarantor – whose primary concern is to have knowledge concerning the solvency of the principal debtor in order to assess the likelihood of being called upon to repay the credit granted - that directive must be regarded as not being designed to apply to contracts of guarantee.' (26) 'Furthermore, the scope of the Directive cannot be widened to cover contracts of guarantee solely on the ground that such agreements are ancillary to the principal agreement whose performance they underwrite, since there is no support for such an interpretation in the wording of the Directive, as was pointed out in paragraph 18 above, or in its scheme and aims.'

sumer Credit, subsequently sought to extend protection;²⁶ yet the most problematic agreement, the non-professional guarantee of a business loan, fell outside the scope of the draft. At the behest of the financial services' industry, the Directive has since been revised by DG Internal Market. Yet in its most recent metamorphosis the influence of consumer protection is almost entirely lost.²⁷ The draft directive jettisoned the proposals relating to non-professional, consumer suretyships.²⁸

B. *Characteristics and risks of Surety agreements*

The characteristics of the surety or guarantee contract can be briefly summarised:

- The surety guarantees a sum/performance owed by the principal debtor to the creditor;
- Agreement between surety and creditor is unilateral;
- Traditionally the creditor owed no duty towards the surety;
- There is proximity between surety and principal debtor;
- Suretyships were typically not to the spouse's financial advantage;
- Suretyships were frequently obtained through undue influence;
- Inequality and proximity lead to a duty to inform being imputed to the creditor.

The unilateral status of the suretyship explains the recent trend to recognise that the creditor *has* obligations to the guarantor.

The surety's risk is greatest where a business loan is guaranteed, and, where this does not stand in proportion to the surety's income and assets, this may lead to an indefinite obligation rebounding on the surety following the principal debtor's bankruptcy. This is exacerbated when bankruptcy ensues years after both the agreement and the divorce of principal and surety. The nature of the surety's risk can be summarised:

26 For a history of the drafting of the directive: <http://www.cml.org.uk>.

27 Policy evolution: U. Reifner, *Konsumentenkreditrichtlinie im Europaparlament – Zurück zu den Siebzigern?* (2004) VuR 85, Current critique contained in a modified proposal for a directive on credit agreements for consumers: <http://www.responsible-credit.net>.

28 Amended Proposal for a Directive of the Parliament and of the Council on Credit Agreements for Consumers amending Council Directive 93/13 EC: <http://europa.eu.int/eur-lex>.

- The guarantor is in a weak position as regards both the creditor and the principal;
- A suretyship is an agreement of secondary and accessory liability;²⁹
- The surety's liability is subsidiary to the principal debtor's duty to settle, and accessory to the liability and existence of the principal debt;
- The guarantor's liability is conditional and co-terminous: if the principal debtor's liability is reduced, then the guarantor's liability is proportionately reduced;
- Detrimental modifications to the underlying contract discharge the surety: where, for example, a debtor is given more time to pay, failure to discharge the surety would, otherwise, render the surety's rights worthless.³⁰

These features illuminate the extent to which protection may be delivered by provisions of suretyship and general contract law. Similarly, family law and insolvency law may influence protection. Thus the balancing of interests in protecting sureties is complex and involves *more* than the simple promotion of social justice; freedom of contract must also be upheld. While the law must intervene to avoid wholly disproportionate guarantees, it is also necessary to protect the creditor against fraud through asset transfers between family members. Were suretyships too easily avoided, financial institutions would abandon the market, and/or increase the interest payable to compensate for the risk. Alternately they could turn to other vehicles such as demand guarantees or might simply revert to insisting on secured credit. Moreover, the poverty law paradox is that, whilst over-indebtedness is a growing problem, the effect of higher standards of surety protection might be to isolate the poorest in society even more comprehensively from access to credit. The creditor is placed in an invidious position: the fact that a security has been asked for, should put the surety on notice that the creditor has doubts as to the principal debtor's creditworthiness; yet, instead, responsibility for the 'unwise' agreement and the debtor's wrongdoing is attributed to the creditor. No matter how creditors decide to deal with sureties they can be charged with encouraging indebtedness and of socially divisive behaviour: whether their practice is to stringently re-

29 In England and Wales s.4 Statute of Frauds, 1677, provides that Suretyship agreements involve: 'any special promise to answer for the debt, default, or miscarriage of another person.'

30 Swire v Redman, (1876) 1 QBR 536 at 541. per Cockburn CJ: 'if the creditor binds himself not to sue the principal... he... interfere(s) with the surety's... right to sue... such interference with the rights of the surety -... must operate to deprive the creditor of his right to recourse against the surety.'

quire sureties, leaving ‘bad risks’ to the sub-prime lending market, or whether they decide to waive security requirements to attract market-share can fuel over-indebtedness. Further, and, as the German doorstep sales cases confirm, the creditor *should have* an economic interest in due diligence independent of any regulatory framework.³¹ Due diligence, as an aspect of responsible lending, may represent a nexus between effective protection and financial services’ industry interests.

C. *Polycontextualism*

This survey confirms that the suretyship involves a plurality of parties and interests. The suretyship has a polycontextual function; in which the interests involved can be mediated at a number of levels or fields of law:

- Suretyship law: traditional defences and formal protection;
- Contract law: traditional defences (fraud, duress, mistake, misrepresentation);
- Procedural protection: creditor’s duty to inform of the risks associated with the suretyship;
- Unfair Contract Terms’ law: intervention of exemption clauses;
- Consumer law: formal requirements and duties to inform;
- Family law: protection of family interests, presumption of undue influence;
- Insolvency law: regulation of rights of recourse, symmetry of Fresh Start protection;
- Constitutional law: proportionality considerations (gross/excessive);
- Property law: requiring secured lending;
- General doctrine: undue influence, unconscionability and good faith;
- Behavioural level: due diligence and autonomous regulation of bank practice.

The diverse function of the surety agreement and the variety of locations of protective mechanisms from Member State to Member State affects both the level of protection and the prevalence of such agreements. Property law may insist on the registration of mortgages, so making suretyships relatively more attractive in particular legal orders, such as in Germany. Contrastingly, proce-

31 British Banking Code of Practice now in seventh edition British Banking Code of Practice, March 2005, *available at*: www.bba.org.uk.

dural protection may make the suretyship less attractive, as in England and Wales. Where provisions of Family law are more or less receptive to a presumption of undue influence, or may free the ex-spouse from liability following divorce, more or less protection can be provided.

Whilst common elements in suretyships can therefore be recognised, the coherence of this picture becomes fragmented the higher the abstraction. Member States' legal orders have their own demarcations locating protection in different legal institutions and fields of law. Even at a conceptual level the differences are significant: the suretyship involving either three parties in a two-transaction agreement,³² or a trilateral agreement.³³ Whilst the creditor may be seen in some legal orders as the professional (Germany), in others he or she may also be a non-professional (France). A major distinction emerges in the balances between market-liberal formalism and interventionist, substantive approaches. The market-liberal approach underscores the importance of freedom of contract, while the substantive approach focuses on the parties' bargaining power.³⁴ The market and will react differently as between the type of approach adopted, yet sometimes in surprising ways: a procedural approach may ultimately lead creditors to leave the market, whilst an interventionist approach may lead to problems of moral hazard.

IV. Comparative survey

In the following comparative survey of national approaches a cross-section of protection standards are charted. At this stage the broader contours of a comparative law survey are mapped.³⁵ The section ends by considering the Study Group proposals on the location of protective mechanisms.

32 Two-transactions: M. Siems, No Risk, No Fun? Should Spouses be Advised before Committing to Guarantees? A Comparative Analysis, [2002] ERPL 509 at 517. O. Cherednychenko, The Constitutionalisation of Contract Law: Something New under the Sun? (2004) 8 E.J.C.L.: www.ejcl.org/81/art81-3.html; <http://www.ejcl.org>.

33 J.H.M. van Erp, *Supra* 18: Art. 7:850(1) Dutch Civil Code, provides: 'Suretyship is a contract whereby one party, the surety, obliges himself towards the other party, the main creditor, to perform an obligation to which a third person, the main debtor, is or will be bound towards the main creditor.'

34 U. Reifner, *cited above*, note 27.

35 More detailed national accounts available in A. Colombi Ciacchi *cited above* note 21.

A. *Common Law... and Scotland*

This section deals with the Common law jurisdictions of Ireland and England and Wales and Scotland. Here, despite many commonalities in social practice, there are important disparities of legal approach. As this section seeks to establish the acid question, however, is whether theoretical disparity (or non-availability) of legal rules truly produces a practical divergence of approach. English law has taken the lead in defining onerous procedural requirements for banks and solicitors to comply with to ensure that sureties receive full and independent advice prior to entering into such agreements. Scotland, in the absence of equitable doctrine, has followed this lead indirectly via bank practice and autonomous professional regulation – though not in the letter of the law. Ireland, meanwhile, has instituted, through regulation, a more traditional information paradigm in its law.

i. *England and Wales*

The common law approach relies on doctrine to vitiate unfair contracts: fraud, duress, misrepresentation, undue influence, inequality of bargaining power and, as a last resort, unconscionability.³⁶ Other protective mechanisms, such as exemption clauses are not effective because exemption clauses in suretyships do not work to *exclude* the creditor's liability but to *preserve* the surety's liability. Similarly, the 1999 Unfair Terms in Consumer Contracts Regulations (UTCCR) contemplates the reverse scenario to that typically operating in the suretyship: the spouse entering into a suretyship is not acting in the course of his/her business, whilst, typically, the creditor, as beneficiary, is. Other than through the doctrine of unconscionability, English law does not deal with the substantive unfairness of the surety agreement. Practically therefore, the Courts police suretyships via the creditor's *constructive notice* of the debtor's wrongdoing, the doctrine of *undue influence* and the elaboration of procedural safeguards. In O'Brien a suretyship was set aside where the creditor was held to have had constructive notice of the principal debtor's wrongdoing.³⁷ According to the court in O'Brien, the creditor must seek to ensure that the agreement is properly obtained and, to this end, must take 'reasonable steps' to

36 G. McCormack, in: A. Colombi Ciacchi (ed.) *cited above* note 21. Inequality of bargaining power: Lloyds Bank v Bundy, [1975] QB 326, per Lord Denning at 339 Unconscionability: Alex Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd., [1983] 1 WLR 87 per Millett QC at 94-95. 'First, one party has been at a serious disadvantage... Second, this... has been exploited... in some morally culpable manner...[a]nd third, the resulting transaction has been... overreaching and oppressive.'

37 Barclays Bank v O'Brien, [1994] 1 AC 180.

bring home to the surety the risks involved in the transaction. However, the surety has to establish that he or she had entered into the arrangement as a result of the undue influence, misrepresentation or other legal wrong of the principal debtor. In Etridge (No.2) it was held that creditors must ensure that independent advice is given to the surety: specific criteria, ‘core minimum requirements’, apply to creditors and their legal advisers in all non-business third-party security cases.³⁸ The Law Society of England and Wales issued guidelines for solicitors on the basis of the Etridge (No.2) core minimum requirements, including a draft letter to the spouse standing surety, these guidelines are available on the Law Society’s website.³⁹

ii. *Scotland*

In contrast, Scots’ Case-law adopted a more restrictive approach.⁴⁰ This divergence may be attributed to the fact that the equitable remedies available in England in O’Brien and Etridge (No. 2) are unknown in Scotland and that constructive notice as applied in O’Brien does not exist. The Scottish creditor traditionally owed no duty to disclose details of the principal debtor’s financial position to the cautioner. The exception arose where it could be proven that the creditor misled the cautioner. This approach is confirmed in Smith v Bank of Scotland where it was held that undue influence cannot be presumed in close, family relationships. Meanwhile, in Forsyth it was held that banks were entitled to place a normal degree of reliance on solicitors’ due diligence.⁴¹ Good faith required no more than that the creditor should not take securities where there was reason to think that consent had been vitiated by misrepresentation, undue influence or some other wrongful act. Smith v Bank of Scotland extended the ‘reasonable steps’ owed by the creditor to ensure that the surety is alerted to the risks of the transaction, along O’Brien lines, into Scotland on the

38 Royal Bank of Scotland v Etridge (No.2), [2002] 2 AC 773. Judgment, Lord Nicholls, para 57. ‘if the bank knows that the solicitor has not duly advised the wife or ... if (it) knows facts from which it ought to have realised that the wife has not received the appropriate advice ... the bank will proceed at its own risk.’

39 Solicitors’ duties post Etridge including model letter to wife where charging home to secure loan to husband or his business, Law Society, May 2002, available at: <http://www.lawsociety.org.uk>. Guidelines flanked by provisions on conflicts of interest in the *Solicitors’ Practice Rules, 1990*.

40 L.J. Smith, *Deferential Spouses and Cautionary Wrecks: Personal or Cautionary Obligations in Scots Law*, in: A. Colombi Ciacchi (ed.), *cited above* note 21.

41 Smith v Bank of Scotland, 1997 SC (HL) 111; Forsyth v Royal Bank of Scotland, 2000 SLT 1295; Subsequently: Royal Bank of Scotland v Wilson and another, (2003) SCLR 716.

basis of good faith rather than constructive notice.⁴² Importantly, the ‘reasonable steps’ are only incumbent on the creditor when he or she is put on notice that the cautioner may have entered into the transaction as a result of undue influence, and this will be a matter of fact. Subsequently, while Black and Thomson⁴³ confirmed Smith v Bank of Scotland they made it clear that the English ‘core minimum requirements’ of Etridge (No.2) do not apply in Scotland. Nevertheless, there has always been a strong, practical interest in ensuring consistency between England and Scotland, especially in financial matters. The major banks and building societies have all taken on board the Etridge ‘core minimum requirements’, and the Conveyancing Committee of the Law Society of Scotland has promulgated guidelines similar to those issued by the Law Society of England and Wales. These guidelines are flanked by provisions on conflicts of interests and the rules relevant to professional misconduct.⁴⁴ Thus in practice bank and professional practice ensures that much the same approach and result obtains in Scotland as across the border.

iii. Ireland

Despite the theoretical, and as yet unexplored, basis for a high protective standard contained in the provisions of the Irish Constitution - the protection of family interests and the Directive Principles of Social Policy - Equity played the lead role in Irish suretyships’ law.⁴⁵ Yet important distinctions to the English position emerge. On undue influence, the Irish Supreme Court in Hogan⁴⁶ followed O’Brien but underscored that the husband/wife relationship did not automatically raise a presumption of undue influence. Meanwhile, and more

42 *ibid.* Smith v Bank of Scotland Lord Clyde at 122: ‘All that is required of him (the creditor) is that he should take reasonable steps to secure that... he acts throughout in good faith. So far as the substance of those steps are concerned it seems to me that it would be sufficient for the creditor to warn the... cautioner of the consequences of entering into the obligation and advising him or her to take independent advice.’

43 Clydesdale Bank plc v Black 2002 SLT 764, Thomson v The Royal Bank of Scotland plc., 2003 SCLR 964.

44 Contained in the *Solicitors (Scotland) Practice Rules, 1986* and the *Solicitors (Scotland) Act, 1980*. See: Inter-spouse guarantees: an update, thejournalonline (Journal of the Law Society of Scotland). October 2003, at 34 at: <http://www.journalonline.co.uk/article/1000542.aspx>.

45 P. O’Callaghan, Protection from Unfair Suretyships in Ireland, in: A. Colombi Ciacchi (ed.), *cited above* note 21. See Article 41, Irish Constitution on Fundamental Rights and the particular protection to be afforded the Family, and Article 45, Irish Constitution on the Directive Principles of Social Policy.

46 Bank of Nova Scotia v Hogan [1996] 3 IR 239.

specific to third party guarantees, the court in Fitzgerald held that constructive notice was too easily triggered in England:⁴⁷ banks were only to be put on notice if aware of special circumstances substantiating the principal debtor's wrongdoing. A lower standard of protection than available in England resulted: transactions were not held void for undue influence because the surety had taken a decision a more prudent person would not have taken. However, subsequently, in May 2003, the Central Bank and Financial Services Authority of Ireland Act (2003) came into effect with the dual aims of lending the law on financial services a more consumer friendly focus and to allow a reassessment of the protection of vulnerable customers. In the wake of the Act, the Irish Financial Services Authority (IFSRA) issued a Consumer Protection Code which came into force on 1 August 2006. Chapter 4(3) of the Code requires all financial services' providers to issue a warning on all guarantee contracts.⁴⁸ By this means, emphasis is placed on a more traditional 'information paradigm' model, a model which, in terms of protection, falls short of the 'proceduralised' lead given in *Etridge*.

B. *Established Civil Law Tradition in Western Europe*

Despite belonging to an established tradition of jurisprudence, the western European Civil law tradition discloses a variety of approaches and variations in levels of surety protection. Rather than exemplifying coherence, the approaches taken confront us with a patchwork of protective standards.

i. *Germany*

German law requires, as the Constitutional Court (*Bundesverfassungsgericht*), has laid down, and relies on the substantive rather than the procedural control of surety agreements.⁴⁹ In Germany freedom of contract exists, according to constitutional principles, only where the parties have similar bargaining power and the courts must intervene to protect the guarantor in cases of inequality. In cases in which an *excessive burden* between the sum guaranteed and the

47 Ulster Bank v Fitzgerald cited above note 2: 'the relationship of husband and wife does not give rise to a presumption of undue influence... accordingly, the burden of proving undue influence is on the party alleging it.'

48 Chapter 4(3) Irish Consumer Protection Code reads as follows: 'Warning: As a guarantor of this loan you will have to pay off the loan, the interest and all associated charges if the borrower does not. Before you sign this guarantee you should get independent legal advice.'

49 BverfG, 19 October 1993, *BverfGE* 89, 214 (*Bürgschaft*).

surety's assets and income is determined the courts are bound to intervene to protect the surety. The courts apply the doctrines of immorality and good faith to ensure surety protection.⁵⁰ Yet, as Rott argues, the reality of protection is that Supreme Court (*Bundesgerichtshof*) decisions have simply caught the most extreme cases, and, as all real property assets must be liquidated before an *excessive burden* can be found, the guarantor/surety can effectively lose his home without this being seen as excessive by the courts. Moreover, a finding that the agreement was immoral can be avoided through procedural means; by obtaining judgment through an order for payment procedures.⁵¹ The German approach can be criticised: too little emphasis is placed on autonomy, there is a lack of transparency, and it is too inflexible.⁵²

ii. *Austria*

Despite Austrian case-law approving of the German approach to surety protection,⁵³ Austrian courts pursue a more traditional civil law approach. There are three sources of protection: the Austrian Civil Code (immorality, error or fraud and protection as regards the inclusion of surprising terms in the contract),⁵⁴ the Austrian Consumer Protection Act (Paragraph 25d CPA which allows judicial discretion to reduce the level of the surety's obligation; here, in stark contrast to the German approach, an unfair rather than a 'gross' disparity between

50 Doctrines of immorality (*Sittenwidrigkeit*) 138 BGB and good faith (*Treu und Glauben*) 242 BGB applied.

51 Para. 688 German Code of Civil Procedure (*Zivilprozessordnung*). Such an order can only be avoided if the guarantor can prove the bank chose the order with the sole purpose of avoiding the immorality assessment, this is almost impossible to establish.

52 On the lack of *autonomy*: H.A. Hesse & P. Kaufmann, *Die Schutzpflicht und der Privatrechtsprechung*, (1995) JZ 219; G. Teubner, *Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken*, (2000) KV 288, 296. On the lack of *transparency*: U. Diederichsen, *Das Bundverfassungsgericht als oberstes Zivilgericht*, (1998) 198 AcP 179, 247. On *inflexibility*: P. Rott, *German Law on Family Suretyships: An Overrated System*, in: A. Colombi Ciacchi (ed.), *cited above* note 21.

53 Austrian Supreme Court, Judgment of 27 March 1995, OGH SZ 68/64. W. Faber, *Protection of Non-Professional Sureties in Austria Austrian Reactions to German Developments and Original Ways of Consumer Protection*, in: A. Colombi Ciacchi (ed.), *cited above* note 21.

54 W. Faber *ibid*: Immorality (*Sittenwidrigkeit*): Para. 879 ABGB on good faith and fair dealing, parallels to special rules on usury (Para. 879(2)4 ABGB). *ibid*. Error (*Irrtum*, Para. 871 ABGB), fraud (*Arglist*, Para. 870 ABGB). *ibid*. Surprising terms (*Geltungskontrolle*, Para. 864a ABGB).

the sum guaranteed and the level of the surety's assets and income is required), and the Austrian Bankruptcy Regulation; which organises a third tier of protection by allowing for the discharge of residual debts in cases of personal insolvency to avoid the risk of life-long over-indebtedness.⁵⁵

iii. Belgium

Consumer protection was extended to sureties in Belgium under the terms of the 1991 Consumer Credit Act (CCA). The Act restricts the potential extent of the surety's obligations; sums guaranteed must be specified (Article 34, CCA), and 'all sums' guarantees are null and void. Protection is also given by provisions of Belgian Family law, which provides that contracts endangering family interests can be declared void by the courts. Insolvency law also plays an increasingly important role, allowing for the discharge of non-professional sureties for free: the judge can discharge the surety in full or in part where the obligation is not *proportionate* to his/her income and assets. But many distinctions continue to plague the law: why should the bankrupt debtor's surety be better placed than a non-bankrupt debtor's surety, and why the differences drawn between cases of bankruptcy and cases of collective debt arrangements?⁵⁶

iv. The Netherlands

A layered structure of protection emerges in the Netherlands, with various provisions drawn from different parts of the Dutch Civil Code being applied: Book 3, on patrimonial law; Book 6, on the general law of contract; Book 7, on special contracts and, explicitly, suretyship agreements; Book 1, on family protection generally. The Dutch have thus adopted what has been described as a hybrid strategy between English proceduralisation, German constitutionalisation, while maintaining the freedom to enter into unwise agreements: a strategy between substantive and procedural control; which maintains a general duty on

55 *ibid.* for a *Restschuldbefreiung* three different procedures are available: first, if the principal debtor pays 20% of his debts within 2 years or 30% of his debts within 5 years and the creditors agree, the residual debts will be extinguished (*Zwangsausgleich*); second, the debtor enters a payments' plan (*Zahlungsplan*), based on his assessed income for the next 5 years. Finally, the *Abschöpfungsverfahren* provides that the debtor's assets be liquidated, the debtor meeting at least 10% of his debts, then his residual debts may be extinguished, even against the creditors' collective will.

56 V. Sagaert, The protection of non-professional sureties in Belgian law, in: A. Colombi Ciacchi (ed.), *cited above* note 21.

banks to protect customers, yet obliges sureties to inform themselves as to the scope of their potential liability. Dutch banks are therefore held to stringent due diligence requirements.⁵⁷ Similarly, the Dutch assessment (Paragraph 6.228, Dutch Civil Code) of mistake hinges upon the veracity of information supplied by the creditor.⁵⁸

v. *France*

As Vigneron observes, as part of a move towards greater protection of the family's property, the French Parliament extended consumer protection to all guarantors of non-professional and professional debts in 2003 in the *Loi Dutreuil*.⁵⁹ Consumer protection considerations now predominate in the treatment of professional and non-professional surety agreements in France; contract and surety law playing a more residual role. The balance struck in France favours consumer protection, yet this 'inflation of protection' has caused anomalies in the coherence of the overall standard of protection which is provided: why should, for example, the ex spouse be better placed than the widow or the principal debtor's dependants? Why should consumer protection be extended to businessmen who are not consumers?⁶⁰ The problem with extending the boundary of protection is that the floodgates to other categories of persons are successively opened.

vi. *Spain*

Surety agreements are common in Spain, and are required where solvency assessments identify the debtor as a bad risk to the creditor. Yet protection is, nevertheless, highly fragmented and, ultimately, insufficient. Spanish demarcation of commercial, civil and consumer law contributes to the problem; insisting that the accessory principle precludes the application of protective principles of consumer law to what are deemed 'commercial agreements'. Thus pro-

57 See J.H.M van Erp, Protection of non-professional sureties under Dutch law: a fragmented approach, in A. Colombi Ciacchi, *cited above* note 21. On due diligence: Mees Pierson v Ten Bos Hoge Raad, 3 Januari 1998, *Nederlandse Jurisprudentie* 1999, 285.

58 *ibid.*, mistake: Van Lanschot Bankiers v Mrs Bink Hoge Raad, 1 June 1990, *Nederlandse Jurisprudentie* 1991, 759.

59 See S. Vigneron, Protection of Non-professional Sureties in France: A trop embarrassé, mal étreint, in: A. Colombi Ciacchi (ed.), *cited above* note 21. See: s.L. 341-1 to 341-6, French Consumer Code.

60 *ibid.*

tective principles cannot be extended to commercial, albeit non-professional, surety agreements. Unfair surety agreements are not dealt with by specific legislation or case-law, but thus by a cocktail of general principles of contract law, consumer protection and unfair contract terms. A lack of choice in entering surety agreements on grounds of family ties/emotional dependency is analysed in terms of the lack of consent; and on the distorting effect of insufficient or non-existent information on consent. Similarly, courts may look to the content of standard contract terms to review the validity of surety agreements. Apart from general contract law, explicit surety law, family and insolvency law will influence the validity and extent of surety agreements. It is this familiar diversity of protection that is held responsible for the overall under-protection of sureties. General principles of law have become diluted by the effect of overlapping sectoral rules and regulation.⁶¹

C. *Nordic Countries*

Another patchwork of law emerges in the Nordic countries, where we can contrast the invasive approach taken in Finland, with the adoption of specific suretyships' legislation, with the quite different Swedish perception of and reaction to the problem. Our comparative analysis is limited to these two jurisdictions.

i. *Finland*

Finnish experience with unfair suretyships has been spectacular.⁶² Following the boom of the 80s, characterised by easy credit, little statutory protection and lax banking practice, recession ensued in the 90s. As debts were called in, sureties began to realise the extent of their obligations. As a specific legal framework for protection was unavailable, appeal was made to the general principles of good faith and contractual loyalty. But while these ideas were developed by academics and supported by the lower courts, the Supreme Court refused to extend protection. Developments culminated with the adoption of legislation: the 1999 Guaranties and Third-party Pledges Act (Finnish GA).⁶³

61 T. Rodriguez de las Heras Ballell, Protection from Unfair Suretyships in Spain, Conference Paper, ZERP Unfair Suretyships conference 3-4 November 2006, Bremen (The conference paper is in the Marie Curie ToK project's database in Bremen).

62 T. Mikkola, Protection from unfair Suretyships in Finland, Conference Paper, ZERP Unfair Suretyships conference 3-4 November 2006, Bremen (The conference paper is in the Marie Curie ToK project's database in Bremen).

63 *ibid.* 1999 Act on Guarantees and Third-party Pledges entered into force on 1 October 1999.

The Act was aimed at recalibrating the relationship between creditors and guarantors, in particular, by giving guarantors better insight into what a surety agreement involves before entering into it. The Finnish GA distinguishes private and commercial agreements: where the agreement is ‘private’, the surety being a private party and the creditor a professional lender, the provisions of the Act are mandatory and protection is interpreted to the surety’s favour. The Act provides that if a private person stands surety the maximum amount of liability as well as a time limit for the obligation must be specified. Additionally, the private party may terminate the agreement on notice. Further, the surety’s position *vis-à-vis* the principal is enhanced as regards rights of recourse. While limitation on debts and suretyships is set at ten years, section 5(2) Finnish GA clarifies that non-professional sureties cannot be of unlimited duration. Meanwhile, creditors are placed under significant, compulsory and continuing disclosure duties; sureties have rights to revoke agreements or have their liability adjusted where they have not received adequate information.⁶⁴ Disclosure is comprehensive, embracing information that must be given before an agreement (Section 12), during the agreement (Section 13), and as regards the surety’s rights to information (Section 14). A major caveat is that the provisions do not ensure that sureties have in fact *understood* the information. As far as standard terms are concerned, Section 39 Finnish GA, requires that the Consumer Ombudsman supervise the terms of suretyships. In addition, the Market Court may prohibit use of unfair contract terms in surety arrangements. The formation and content of the agreement may also be determined by general contract law (fraud, duress, undue influence, misrepresentation). These elements are elaborated in the Finnish Legal Transactions Act, which also addresses coercion and good faith. Moreover, contracts may be invalidated or adjusted (Section 7 Finnish GA) where a contract clause is unfair or leads to an unfair result. Insolvency law also provides a measure of protection.⁶⁵ Similarly, provisions of Consumer and, more importantly, Family law may supply protection. Under the 1929 Finnish Marriage Act, property remains separate on marriage, and debts are also to be treated separately. One spouse may be liable to another for the mismanagement of his/her financial affairs. Again a whole

64 On adjustment Section 7(1) Finnish GA, *ibid.* provides: ‘A private guarantor’s liability... may be adjusted if the amount of the principal debt payable by the guarantor is unreasonably high in view of the guarantor’s financial status and the lender knew, or ought to have known, at the time of giving the guarantee, that the guarantor’s liability is manifestly disproportionate to his or her capacity of meeting it. In the adjustment process, the guarantor’s age, ability to pay and other circumstances, both at the time of giving the guarantee and after it, shall be taken into account.’ (Translation: Conference Paper 2006, T. Mikkola).

65 Adjustment of the Debts of a Private Individual Act (Act 57/1993).

body of supplementary principles and rules drawn from diverse areas of private law provide additional protection. The real standard of protection remains to be elaborated both as regards sureties' rights and creditors' obligations in practice.

ii. Sweden

Unlike Finland there is no specific legislation on Suretyship law in Sweden. Instead, a general framework is supplied by provisions of the Civil Code, the Swedish Contract Act and the Swedish Consumer Credit Act. The important role of coordinating this framework falls to Swedish judges and their elaboration of the case-law.⁶⁶ Whilst suretyships are widely used, they are related to over-indebtedness only to a minor extent: surety agreements arose in only 3% of insolvency cases in 2005. This lack of a correlation between suretyship and over-indebtedness can be attributed to the credit information available to the banks, bank practice and the broader availability of debt-restructuring. Swedish social provision defuses the problem of over-indebtedness in the first place. Meanwhile, Swedish Family law offers little protection to the spouse even in cases of divorce.

D. The Baltic States

Again with the Baltic States we are confronted with diversity of approach. Moreover, while each of the Baltic States transplanted a foreign or model law in the early 90s on attaining independence, these 'transplants' were introduced with little reflection on the quite different economic and social reality obtaining in the different States.

i. Estonia

Kull notes that the implementation of the existing consumer *acquis* into the Estonian legal order has been successful, culminating with the 2002 Law of Obligations.⁶⁷ European model laws (PECL and PICC) and conventions

66 A. Persson, Unfair Suretyships in Europe – Country Report of Sweden, Conference Paper, ZERP Unfair Suretyships conference 3-4 November 2006, Bremen. (The conference paper is in the Marie Curie ToK project's database in Bremen).

67 I. Kull, Protection from Unfair Suretyships in Estonian Civil law, Conference Paper, ZERP Unfair Suretyships conference 3-4 November 2006, Bremen. (The conference paper is in the Marie Curie ToK project's database in Bremen). Estonian Law of Obligations at: <<http://www.legaltext.ee>>.

(CISG) as well as Swiss and German law have been influential on Estonian codification. Yet the social and economic background against which these ‘Europeanised’ rules operate is quite different to most western European States.

- First, creditors on the Estonian market simply do not find taking personal securities an attractive option, preferring, instead, to either take securities in property or simply waive security requirements altogether;
- Second, some evidence has tended to suggest that the western ‘gender assumption’ inherent in suretyship agreements is reversed by social reality in Estonia.

Predictably, given the low incidence of surety agreements, protection is supplied by a diverse body of case-law rather than by statute; the 2002 Law of Obligations provides only a general framework of protection. Non-professional, consumer sureties are protected by a number of mechanisms in Estonian law: Article 143 Law of Obligations specifies that, for consent to be informed and in order to protect the weaker party, both the extent of the obligation and an upper limit of potential liability must be set for a suretyship to be valid. As in other legal orders, the surety is also protected by accessory and subsidiarity, as well as by the information obligations incumbent on the creditor. Finally, the surety may also be protected by the principle of good faith (Section 6, Law of Obligations). Special laws such as the General Part of the Estonian Civil Code, 2002, also protect the surety with provisions on unconscionability, mistake and fraud. Yet the reality is that the small number of loans entered into and the dearth of case-law on the standard of protection suggests that the overall level of protection is likely to be lower than in most western European legal orders.

ii. Lithuania

In Lithuania, as in Estonia, non-professional personal suretyships are uncommon. Instead, creditors prefer and rely on *in rem* security provision. Predictably, this has meant that there is no case-law on non-professional suretyships. Suretyships are more likely to be encountered either in the context of family mortgages on real property or in commercial relationships. Lithuanian law, whilst inspired by UNIDROIT and PECL Principles, does not draw a clear distinction between commercial and non-professional suretyships, and does not classify the surety agreement as a consumer contract to which provisions of consumer protection would apply.⁶⁸ Again, these ‘new’ rules have been trans-

68 A. Smaliukas & G. Šulija, Unfair Suretyships in Europe: Lithuania, Conference Paper, ZERP Unfair Suretyships conference 3-4 November 2006, Bremen. (The con-

planted into a quite different social and economic reality. For example, accession has left the young with greater income and assets, reversing the traditional demographic pattern against which the instrument has operated in western Europe. Predictably, the few cases that have been dealt with by the Lithuanian Supreme Court concern commercial agreements. Thus the survey of protective mechanisms in surety agreements is a theoretical exercise: protection is supplied through the general law of obligations, contract law provisions relating to good faith and, most importantly, gross disparity (excessive advantage) as transplanted from Article 3.10, UNIDROIT Principles (1994). To a limited extent, family law provisions on consent to enter into agreements concerning family assets or jointly owned property or rights are relevant.⁶⁹ As surety agreements are not regarded as consumer contracts, protection is organised by the Law of Obligations rather than consumer law.⁷⁰

iii. Latvia

In contrast to Lithuania and Estonia, the Latvian Civil Code (Latvian CC) is based on the Swiss Civil Code rather than UNIDROIT or PECL Principles. Whilst reference is also frequently made in court to German practice and principles, it is the Latvian CC that is charged with ensuring protection against unfair suretyships. Sections 1691-1715 of the Latvian CC lay down the relevant provisions. Unlike both Estonia and Lithuania, surety agreements are very important to Latvian banking practice. However, the majority of suretyships are

ference paper is in the Marie Curie ToK project's database in Bremen). On the focus of recent suretyship reform see: A. Smaliukas, Reform of Security over Movable Property in Lithuania: Evaluation *de lege lata* and proposals *de lege ferenda*, (2004) 15 EBLR 879.

69 *ibid.* General law relating to invalid transactions i.e. statutory provisions, public order, good morals, intention to create legal relations, transactions entered into by minors, legal capacity, consent, fraud, duress, economic pressure, real threat, exceptional circumstances (Articles 1.80- 1.91 Lithuanian Civil Code (LCC)). Contract law provisions on good faith (Art. 1.5, Art. 6.158 LCC) and gross disparity (Art. 6.228 LCC). Standard terms specifying that the weaker party have “adequate opportunity” to acquaint him or herself with the terms of the contract (Article 6.185 LCC, as based upon Article 2.104 PECL (ex Art. 5.103 PECL) on “terms not individually negotiated.”), to challenge the validity of “surprising terms” (Art. 6.186 LCC, as transplanted from Art.2.1.20 UNIDROIT Principles 1994). Finally, Family law protection engages Article 3.96 LCC.

70 Smaliukas and Šulija, *ibid.* pinpoint Articles 1.90 and 1.91 LCC on ‘mistake’ and ‘exceptional circumstances’, Article 6.228 LCC on ‘gross disparity’, Articles 6.185 and 6.186 LCC on ‘adequate opportunity’ and ‘surprising terms’ as provisions suggesting a ‘potentially high’ level of surety protection.

attached to real property: over 60% of suretyships relate to loans secured by mortgages. In the light of intense competition for financial services loans are easily available and banks are lowering their security requirements, and state regulation is regarded as lax.⁷¹ The protection of sureties is organised on the basis of the surety agreement as an agreement of accessory, secondary and subsidiary character. Non-professional suretyships are not clearly demarcated from commercial suretyships. Moreover, there are no explicit national rules relating to consumers entering into surety agreements and no statutory rules on if and when a surety agreement involving a non-professional will be considered unfair. Section 1415 of the Latvian CC on ‘impermissible or indecent actions’ may be applicable to surety agreements where there is a gross disproportion between the amount of the debt and the surety’s assets and income.⁷² Yet, in common with Estonia and Lithuania, there is simply no case-law amplifying this point. Meanwhile, contemporary Court practice in Latvia suggests that Courts would adopt a *laissez-faire* rather than interventionist approach towards suretyships.⁷³

E. Central and Eastern Europe

A diverse approach also emerges in the fifth and final legal tradition: the Central and Eastern European States. Again, the social and economic reality, as well as intense competition amongst financial institutions in these states leads to a different perception and response to the suretyship ‘problem’. Graver problems conceal the problem of unfair suretyships.

i. Poland

The suretyship has been of major importance in securitising credit relations in Poland, especially in the context of larger or longer term loans such as student finance. There is a strong relationship between non-professional surety agree-

71 T. Klauberg, Protection from Unfair Suretyships, Conference Paper, ZERP Unfair Suretyships conference 3-4 November, Bremen. (The conference paper is in the Marie Curie ToK project’s database in Bremen). Currently 63,2% mortgage suretyships, 23 banks operate in Latvia serving a population of 2.5 million people.

72 *ibid.* Section 1415, Latvian CC, provides: “An impermissible or indecent action, the purpose of which is contrary to religion, laws or moral principles, or which is intended to circumvent the law, may not be the subject-matter of a lawful transaction; such a transaction is void.”

73 As Klauberg *ibid.* notes, Latvian courts have approved commercial practice on late payments involving penalties of 1% a day.

ments and indebtedness.⁷⁴ Polish law regulates surety agreements in the Civil Code (Polish CC) in Articles 876-887. The provisions apply generally and, potentially, supply protection to all types of surety whether professional or non-professional. Whilst there is no Consumer Code in Polish law there is a Family and Guardianship Code, which provides additional protection. The Polish CC stipulates that the surety agreement has to conform to formality requirements: it must take written form and disclose the surety's intent. According to Article 880 Polish CC, the creditor must notify the surety immediately on the principal debtor's default. The surety's defences against surety obligations can be divided into two groups: defences arising out of the primary debt (i.e. where the primary contract is null and void; where limitation vitiates the surety's obligations; where the principal has completely or partially performed his or her obligations), and the surety's personal defences (intent, fraudulent misrepresentation, error). Additionally, Article 357 Polish CC allows parties to argue an extraordinary, unforeseeable change in circumstances rendering performance impossible or difficult. It is then for the courts to assess the extent to which parties may be held to their obligations. The general provisions of Article 58 and 353 Polish CC, allowing the courts the broad competence to rule on the validity of contracts contravening principles of community life and on the lawfulness of the contract itself provide additional measures of protection.

ii. Hungary

Banks have responded to the avalanche of credit default in the early and mid-1990's and to combat the 'shield' limited liability in company law was seen as providing.⁷⁵ However, and undermining surety protection, Hungarian insolvency law has made no provision for 'fresh-start' procedures. Progressively, therefore, banks required more and more security in lending transactions throughout the 1990s. The legislator also reacted with the introduction of a new secured transactions law in 1996. To protect themselves against risk and fraud, creditors responded by accumulating as many security devices as they could. More recently, in the last two years, renewed competition amongst the banks has led to the introduction of more 'consumer friendly' financing schemes aimed at 'riskier' social groups. This development has been accompa-

74 I. Lobočka, Protection from Unfair Suretyships in Poland, Conference Paper, ZERP Unfair Suretyships conference 3-4 November 2006, Bremen. (The conference paper is in the Marie Curie ToK project's database in Bremen).

75 T. Tajti, Unfair Suretyships in Hungary – An Undetected yet Existent Problem, Conference Paper, ZERP Unfair Suretyships conference 3-4 November, Bremen. (The conference paper is in the Marie Curie ToK project's database in Bremen).

nied by a weakening of the insistence on suretyships. The perception that suretyships could be unfair, or even the idea of predatory lending as a phenomenon, has simply not yet arisen on the market or in discourse. The surety agreement is overwhelmingly seen positively as a complementary credit device. Here it can be argued that graver problems conceal the problem of unfair suretyships.

iii. Slovenia

The non-professional surety has been an indispensable instrument for Slovenian financial institutions.⁷⁶ Personal security is frequently the only means by which loans can be secured. Again there is a dearth of case-law on unfair suretyships and the legislator has yet to intervene. Evaluating the extent of protection is therefore a matter of speculation. The Code of Obligations (Slovenian CO) confirms the accessory and subsidiary nature of the surety agreement. However, the subsidiary nature of the obligation is frequently undermined by bank practice to insert explicit words into the contract: ‘as a surety and payer’, whereby the surety assumes the position of joint-debtor. Consumer protection is supplied by the Consumer Protection Act (CPA) and, in the non-professional suretyship context, by the Consumer Credit Act (CCA). Both acts only apply to the asymmetrical relationship between the non-professional consumer and the professional business lender. Neither CPA nor CCA contain any explicit provision on surety agreements. As with other new accession states, Slovenian insolvency law does not provide for ‘fresh-start’ procedures. Moreover, there is no proceduralised duty incumbent on credit institutions to inform sureties on the risks they assume on standing surety. In the absence of a specific legal framework, potentially unfair agreements have to be assessed in the light of the general rules on unfair contracts. Two options in challenging agreements arise: usury (Article 119 Slovenian CO) and immorality (Article 86 Slovenian CO). Whilst establishing usury would be difficult, the Slovenian Supreme Court ruled in 2005 that lower courts must declare immoral contracts null and void on the basis of Article 86. It remains to be seen whether this ruling will act as a catalyst of protection. Given the lack of a legal framework and legislative inaction, sureties continue to rely on judicial activism.

76 S. Mežnar, Protection from Unfair Suretyships in Slovenia, Conference Paper, ZERP Unfair Suretyships conference 3-4 November 2006, Bremen. (The conference paper is in the Marie Curie ToK project’s database in Bremen).

F. Study Group Proposals

Notwithstanding the divergence of national approaches identified in this paper and the metamorphosis of the Commission's approach to the draft directive on consumer credit, the Study Group on a European Civil Code (SGECC), in work led by *Prof. Ulrich Drobnig*,⁷⁷ assigns protection of the vulnerable surety to the general law of contract as fleshed out in the *Principles of European Contract law* (PECL),⁷⁸ and the specific provisions elaborated by the SGECC.⁷⁹ These instruments adopt a more traditional private law (Austrian) rather than constitutionalised (German) approach: unfair surety agreements can be challenged where their provisions contravene substantive legal norms on good faith and fair dealing (Article 1:201 (ex 1.106) PECL); the provisions on excessive benefit and unfair advantage (Article 4:109 (ex 6.109) PECL); and, finally, the provisions relating to unfair contract terms which have not been individually negotiated (Article 4:110 (ex 6.110) PECL). Yet, more controversially, the specific framework for personal sureties relies heavily on *duties to inform* (Personal Security Contracts, Chapter 4, Articles 4:101-4:108 SGECC), apart from rules on pre-contractual information (Article 4:103 SGECC)⁸⁰ this

77 Working Team on Credit Securities, Study Group on a European Civil Code. Documentation: <http://www.mpipriv-hh.mpg.de>.

78 Principles of European Contract law (PECL) at: <http://frontpage.cbs.dk/law>.

79 Special provisions available at: www.sgecc.net Particular rules on areas of contract law: http://www.sgecc.net/pages/en/texts/index.draft_articles.htm.

80 *ibid.* Para 4.103 SGECC, 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

also includes a duty on the part of the creditor to inform the surety annually of the precise extent of his/her liability (Article 4:107 SGECC).⁸¹ As previously discussed, the information paradigm is particularly unsuited to non-professional surety agreements.

V. Conclusions

A. *The uncommon core*

The uncommon core of suretyships' law can be explained by the fragmentation of the context in which they operate; suretyships seen as a part of a wider spectrum of guarantees; of a *layering* of protective mechanisms. Against this background, standards of protection are fleshed out in the framework of specifically *national* consumer debtor protection. Even when we look to the main European legal traditions we thus find more divergence than convergence. This means that we need to consider a number of legal institutions, differences in banking practice, social and economic factors as they vary from one Member State to the next in comparing the nationally specific level of surety protection. In turn, this hinders the integration of a European Credit market. Moreover, social and behavioural factors can play a decisive role in determining the real extent of liability: the level of social welfare may influence the likelihood of the principal's default (Sweden); whilst banking practice will also influence the standard of protection (England). Legislators and judiciary have to find the balance between competing interests in polycontextural suretyships law: between contractual security and the interests of guarantors; between family and bank interests; between the parties' rights in bankruptcy; between family members' rights.

Moreover, the fleshing out of protective levels in suretyships law takes place in a fundamentally contested environment. Can we accept the bald proposition that the market is self-sufficient, or the economic case that the market will right itself? Here, English experience is that judicial intervention, insisting on objective, proceduralised bank practice, is always necessary. By extension we can see how credit institutions are caught in an invidious position, no matter how they decide to deal with sureties they can be charged with

the preceding paragraphs, the return of benefits received by the parties is governed by PECL 4:115 or by Book VII.

81 *ibid.* Para 4:107 SGECC: '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.'

encouraging indebtedness: whether their practice is to stringently require security, leaving ‘bad risks’ to the sub-prime lending market, or whether they decide to waive security requirements and fuel over-indebtedness. Amongst the hard choices facing legislator and policy-maker is the proposition that, sometimes, less protection is more effective protection. It is this contested environment that is held responsible for the under-protection of sureties; an environment in which general principles of law have become diluted by the effect of overlapping sectorial rules and regulation.

B. Variations of Approach

The social, economic and legal environment affects the prevalence, nature and operation of surety agreements. In particular, divergence arises between the function and perception of suretyships in eastern and western Europe. Thus private law is Europeanised and legal transplants (i.e. of national or model laws) are adopted without the necessary social, economic and legal background being in place.

- Ex-Communist societies share a legacy of underdeveloped security law. All Eastern accession states had to transplant legal institutions from other legal orders.
- All eastern accession states adopted a market, rather than social market economic model. National reform has tended to stress more the *laissez-faire* than the regulatory model, courts have been especially light handed in adjudicating commercial practice.
- Given the significant competition for financial services, lower thresholds of security, and a move away from surety agreements have been initiated by creditors in the more competitive Eastern accession markets.
- The idea that suretyships are unfair or that lending can be predatory are sophisticated concepts. Graver problems conceal such ‘western’ considerations in many of the Eastern accession states, where families tend view the suretyship less critically, or even positively.

This paper has mapped the uncommon, networked and porous core of European suretyships’ law.⁸² Not only is the structure of suretyships’ law uneven, the legal context and function of surety arrangements differing from one legal order to the next, the effectiveness of protection and the prevalence of suretyships varies from Member State to Member State. Furthermore, approaches

82 B. de Sousa Santos, *Law: A Map of Misreading. Towards a Post-Modern Conception of Law* (1997) 14 J.L.S. 279, at 298: ‘We live in a time of porous legality ... of multiple networks of legal orders forcing us to constant transitions and trespassings.’

diverge between trends towards constitutionalisation and towards consumerisation of the law.⁸³ In each legal order sureties take a unique place in a subtle web of legal, social and behavioural standards. The national approaches can be broadly characterised:

- England: stringent procedural requirements; protection provided through doctrine of undue influence and constructive notice.
- Ireland: an equitable approach, divergence with England on undue influence and constructive notice, new reliance on procedural safeguards.
- Scotland: freedom of contract approach; importation of Etridge procedural guidelines in credit and legal practice.
- Germany and Austria: divergent focal points on gross/excessive and unfair disproportion between the sum guaranteed and the Surety's assets and income.
- Germany and Austria: German adoption of a constitutionalised private law approach, Austrian maintenance of a more traditional private law approach.
- Netherlands: layered provisions of civil code, with a case-law emphasis placed on private autonomy.
- France: consumer protection approach, professional and consumer contexts treated the same way; assertion of a high standard of protection for family property.
- Belgium: approach relies on proportionality-based insolvency law.
- Spain: position is based on a kaleidoscope of protection.
- Finland: adoption of specific legislation on suretyships; setting *inter alia* that the extent and duration of the obligation be specified in advance, and the surety the right to terminate the agreement. Family law also provides a large measure of protection.
- Sweden: reliance on a combination of case-law; banks due diligence and broad availability of debt-restructuring. Swedish social model also acts as a shield against over-indebtedness.
- Estonia: protection, such as there is, provided by a diverse and contradictory body of case-law. Statute, however, lays down the extent of the obligation and an upper limit of potential liability to be set.

Clearly, creating a uniform approach out of such diversity and differentiation risks causing more legal fragmentation than it promises to supply truly uniform

83 O. Cherednychenko, *cited above* note 32, at 4-5.

law.⁸⁴ Particularly striking is the English approach which bases protection in *adjectival (procedural)* rather than *substantive* law. This highlights a peculiar blindspot in codification discourse; the civil law tendency to concentrate on theoretical, substantive law convergence rather than the very different nuts-and-bolts questions of procedure, stressing the age-old linkage of remedies and rights in the common law – *ubi remedium, ibi ius* – more important to the real-world practitioner.⁸⁵ Yet, at the same time, the case for passing rationalisation measures where there is some degree of commonality should not be dismissed out of hand: whilst it may be asserted that harmonisation and codification should be restricted to areas of substantial legal homogeneity, the interests behind moves to greater coherence and the potential advantages of a single market in financial services cannot be ignored. Similarly, creditors have to recognise their own interests in due diligence standards: no interests are served if the surety is unable to service his/her debt and the creditor cannot ultimately recover anything. However, the means by which such a measure of commonality can be best achieved can be disputed. The perennial *Keck*-style question of whether market-integration should be sacrosanct amongst all other claims, or whether we can allow for difference and experimentation in the law, without destroying the integrity of the internal market as a whole, needs to be addressed once again.⁸⁶

84 Fragmentation via harmonisation: B. Heß, Die Integrationsfunktion des Europäischen Zivilverfahrensrechts, [2001] IPRax 389. Harmonisation – given upward derogation, varying approaches to drafting secondary law and divergent transposition – *causing* legal fragmentation. Polycentricity dominates the law relating to cross-border trade: EC law, new *lex mercatoria*, UN Vienna Convention, Unidroit Principles and 1980 EC Rome Convention.

85 Critique of codification: P. Legrand, Antivonbar, *cited above* note 5 at 24 ‘The common law will not be allowed to be itself. For von Bar, the way in which the common law actualises itself in an authentic manner is to be destroyed in the name of the rule of technology, bureaucracy, and the commodity form. Within his governance project, the basic characteristics defining the common law’s being – its contractual being vis-à-vis the civil law’s – are to be estheticised out of existence without any investigation being conducted into the belonging of which a cultural form like the common law is the expression, without any examination of the *presence* of the common law.’

86 Joined Cases C-267 and 268/91, *Keck and Mithouard*, [1993] E.C.R. I-6097, paras 16 and 17. Confirmed: Joined Cases C-401 and 402, *Tankstation t’Heukste and J.B.E. Boermans*, [1994] E.C.R. I-2199, para. 12. Similarly: Case C-376/98, *Tobacco Advertising*, *cited above*, note 13. S. Weatherill, Why object to the Harmonisation of Private law by the EC? [2004] E.R.P.L. 633 at 646: ‘the demise of the political assumption that the EC possesses a competence *carte blanche* to harmonise laws may clear the way to a more explicit and constructive focus on what really is needed of a programme of harmonisation in the modern EU... the context has al-

C. *The Fault-lines of legal fragmentation*

A welter of contradictions emerge from within and between European legal orders in the field of suretyships' law. Some of the more striking distinctions fuelling this incoherence can be recited; first, we can turn to a number of problematic distinctions within legal orders:

- Belgian reliance on insolvency law leads to a problematic distinction between the situation of the guarantor of a bankrupt debtor and that of a non-bankrupt debtor.
- In France, whilst provision is made to discharge the ex-spouse when the principal debtor defaults, the surety-widow and surety-dependants are less well placed.
- In Germany the test of gross/excessive disproportion between the sum guaranteed and the surety's assets and income, means that sureties with real property assets are comparatively less well placed than sureties with no such assets.
- Restrictive English treatment of the creditor/solicitor relationship means that the creditor cannot escape the straitjacket of constructive notice.
- The traditional Irish position rejecting a presumption of undue influence, but allowing a heightened risk of undue influence in the family relationship can be seen as artificial.

Similarly, problematic distinctions emerge between legal orders:

- How sensitive should any proportionality test be? What type of proportionality test: Gross/excessive or unfair? Relating to the validity of the agreement as in Germany, or to the enforcement possibilities as in Belgium?
- The extent to which national approaches have been constitutionalised (Belgium, Germany and Austria) or consumerised (England, Ireland).
- The treatment of professional and non-professional sureties: In contrast to Germany, where the surety's contractual inferiority to the creditor is indispensable, Austrian rules also apply as between non-professionals. Meanwhile, no distinction is drawn as between the professionalism of either party in France.
- Doctrinal differences amongst legal orders sharing legal traditions: constructive notice is easily triggered in England, too easily according to Irish courts. Meanwhile, Scotland knows of no such doctrine.

tered. Centralisation is under fire. Harmonisation has become a more constitutionally contested process.'

- Divergent approaches to the presumption of undue influence in the family: a liberal presumption of undue influence in England and Germany contrasting with a more conservative approach in Ireland and Scotland.
- In the Baltic States whilst the Community *acquis* provides a basic framework. The accession states, have used a variety of models in shaping their civil law: Swiss (Latvia), German but also CISG and UNIDROIT (Estonia) and PECL (Lithuania) model laws. Most of the legal orders of the accession states have been heavily influenced by German, Austrian and Swiss legal traditions.
- A number of traditional Western assumptions about the suretyship appear to be reversed in the Baltic States: suretyships being used as a means of supporting the older generation, and made more often by the husband for the business debts of the wife.
- The suretyship performs different functions from country to country: serving as a device to secure student finance in Poland; as a means of supporting the younger generation in Slovenia.
- Divergence as between Nordic countries. Whilst in Finland the level of surety protection introduced by explicit legislation is impressive (maximum amount of liability as well as a time limit for the obligation to be specified, private party may terminate the agreement). Meanwhile, Swedish social provision obviates the need for legislative intervention.

D. *Alternatives: in-between worlds?*

It can be countered that some commonality is present in suretyships' law, but at a different level; that a type of uniformity emerges from the tension at the heart of the uncommon core. If we can understand suretyships' law as the law of an interface, of a spectrum or layering of overlapping legal systems, then, whilst some elements may require uniform treatment, we can otherwise rely on a conflicts' approach, competition and spontaneous harmonisation. In describing uniformity through tension we have to change our perception of law. The central idea here is that law depends on contradiction; that a multiplicity of systems can also work as a unitary network, producing, as *Teubner* notes, a hybridised, ambivalent unity: '(O)nly the combination of both sides of the difference... brings out the special nature of the hybrid: neither mediation nor syntheses, but extremely ambivalent unity.'⁸⁷

87 G. Teubner, In the Blindsopot: The Hybridisation of Contracting, at 11. *Available:* <http://www.jura.uni-frankfurt>. G. Teubner, Das Recht hybrider Netzwerke, (2001) 165 ZHR 550.

The contract is thus described as combining economic, productional and legal aspects, each facing the other in structural coupling. Can we use *Teubner's* juxtaposition of hybridisation (integrating networks) and differentiation (closed systems) to illuminate the blindspots in suretyships' law: to see the layering or spectrum of protection, and the variable access to credit in terms of a unitary network?⁸⁸ Can an ambivalent unity be seen in the simultaneous promotion of surety protection and private autonomy, and in the parallel operation of regulatory competition and competition in the financial services' market: the legal unity of law as a process, or laboratory, or, in *Amstutz's* terms, the *Zwischenwelt*.⁸⁹ According to *Teubner*, freedom of contract, in this layered context, is a much broader concept: 'While... freedom of contract was limited to the protection of free choice in the market against fraud, deception, and... political interference, the new freedom of contract... extend(s) to a protection of contract against the free market itself.'⁹⁰ In this model the need to limit autonomy, to respect a complex of social expectations and third party interests is accentuated, *Teubner* concluding that constitutional law will play a mediating role in this hybridised, discursive contract law:⁹¹ '(C)ontract as interdiscursivity raises... the issue of constitutional rights... these rights can no longer be seen as protecting only the individual actor against the repressive power of the state, but... need to be reconstructed as 'discourse rights'... The... correlate of contract as translation would be an extension of constitutional rights into the context of private governance regimes.'⁹² Yet the implications of such constitu-

88 As *ibid.* *Teubner* asks at 11: 'Can we, using two mutually contradictory, equally entitled theories neither reducible to the other see the contract as a multiplicity of systems and simultaneously as a unitary network.'

89 M. Amstutz, *Zwischenwelten. Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht*, in C. Jeorges & G. Teubner (eds.), *Rechtsverfassungsrecht* (Baden-Baden, Nomos, 2003) at 237: 'The consequences of this transformation can barely be predicted at the moment... much will depend on whether national legal approaches will open themselves to the evolutionary logic of relational strategy behind the *Marleasing* case-law. This in turn will depend on fundamental rearrangements in continental legal methodology which, even to this day... places written law at the centre of its operations.' (author's translation). See also by same author: *In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning* (2005) 11 *ELJ* 766-784.

90 G. Teubner, *cited above* note 87, at 14.

91 S. Weatherill, *The Commission's Options for Developing EC Consumer Protection and Contract law: Assessing the Constitutional Basis*, (2002) 13 *E.B.L.R.* 497. O. Gerstenberg, *cited above* note 20. H. Schepel, *The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to 'Constitutionalise' Private Law*, (2004) 12 *ERPL* 661.

92 G. Teubner, *cited above* note 87, at 18.

tionalisation on the constitutional democracy are, as *Hirschl* observes, massive and potentially pernicious; launching a process in which lawyers intervene to insulate traditional hierarchical patterns:

‘By keeping popular decision-making mechanisms at the forefront of the formal democratic political processes while simultaneously shifting the power to formulate and promulgate certain policies from majoritarian policy-making arenas to semiautonomous professional policy-making bodies, those who have disproportionate access to and have a decisive influence upon such bodies minimize the potential threat to their hegemony... the current global trend toward judicial empowerment through constitutionalisation is part of a broader process whereby self-interested political and economic elites... attempt to insulate policy-making from the vagaries of democratic politics... (I)t can best be understood as an attempt to defend established interests from the potential threats posed by the voices of cultural divergence, growing economic inequality, regionalism, and other centrifugal forces that have been given a public platform through the proliferation of representative democracy.’⁹³

Alternatively to the language of discursivity, constitutionalisation and hybridisation, the common-law model can be seen as providing a more pragmatic and, ultimately, a more rigorous standard of protection. Additionally, the common law approach avoids the substantive subordination of democracy involved in the constitutionalisation approach. Coupled to a competition of legal orders, case-law allows for the adoption of more efficient ‘due diligence’ solutions and experimentation,⁹⁴ with the added benefit that it does not dilute freedom of contract. The adoption of a more pragmatic, common law solutions, could, in *Ward’s* terms, provide a more imaginative alternative to constitutionalism.⁹⁵ Furthermore, even in *Teubner’s* terms German-style constitutionalism is unsatisfactory, weakening rather than enhancing the real level of protection: the impact of constitutionalism, crucially, always depends on judicial interpretation and the impact of a new strain of judicial activism. Whilst the full application of a fundamental rights’ approach could work to strike down the most egre-

93 R. Hirschl, *Towards Juristocracy*, (Harvard UP, Harvard, 2004) at 217.

94 L. Kähler, *Decision-Making about Suretyships under Empirical Uncertainty – How Consequences of Decisions about Suretyships Might Influence the Law*, (2005) 13 ERPL 333.

95 I. Ward, *Beyond Constitutionalism: The Search for a European Political Imagination*, [2001] 7 E.L.J. 24, at 39-40. ‘Europe’s future does not lie in ideologies or institutions, or in Treaties or charters of various enumerated rights... Europe’s future lies in the political imagination; in its ability to think rather more of liberty, and rather less of ‘democracy’; rather more of equality, and rather less of the ‘rule of law’.

gious types of guarantees, caution counsels against such an approach.⁹⁶

E. *Blindspots in Surety Protection*

Whilst it can be argued that duties to inform are of little use to the surety in a family relationship, it can be countered that, where the informational threshold is high enough, as in England and the Netherlands, both the surety and, more importantly, the creditor will ultimately be influenced. However, precisely in these countries suretyships are rarely resorted to, and, if they are entered into at all, they are almost always linked to mortgages on real property. Far more common in these countries is resort to the more stringent, costly and unsecured demand guarantee, a mechanism which offers the guarantor even less protection. Similarly, even the best intentions behind the French consumer protection approach move creditors to leave the suretyship market. The result in all three countries is that the poorest in society are either offered worse terms on guarantees or are denied access to prime credit by financial institutions. The paradox of surety protection is that less is more; promoting standards of weak constitutional protection as in Germany ensures broader and less costly access to credit. In effect there is a double paradox: the lower the effective level of surety protection, the more widespread the resort to suretyships and the more equitable the access to credit. The higher the level of effective protection, the lesser the prevalence of the suretyship, the greater the problem of debt-related social exclusion.

But we can go further, the treble paradox in the treatment of suretyships in the context of consumer debt is that European law and continental legal science as a whole has cultivated its very own blindspot towards poverty law: suretyship arrangements, after all, concern access to prime rather than sub-prime credit; Commission and civil law concern with the proportionality, constitutionality and social justice implications of the treatment of suretyships appears to confirm the woeful invisibility of social exclusion, and the uglier reality of sub-prime lending in Europe in both the Commission and at an academic level on the Continent: the need for intervention in prime lending in Rotting Dean on grounds of social justice, and a *laissez faire* approach to sub-prime lending in South Shields in the name of the free market would be a perverse policy message even by EU standards. Yet in this treble paradox we can also see the danger of overloading private law with too many irreconcilable objectives; as can be seen in surety-

96 G. McCormack, *cited above* note 21, cites judicial circumspection towards developing broad doctrine; a lack of a tradition in constitutional adjudication; a reluctance to tying the hands of future legislatures; and the broad principle and policy basis of constitutions as grounds against constitutionalising private law.

ships, seeking the highest level of social protection can be counter-productive. Furthermore, the problem of over-indebtedness has clearly not disappeared in those countries with effectively higher standards of surety protection yet with lower prevalence of such agreements, in such countries such problems are simply transformed by the marketplace into problems relating to charges on mortgages and resort to demand guarantees. Finally, the stringency of the approach taken has implications for standards of due diligence; low effective protection can represent a moral hazard for creditors.

F. The roles of legislative and non-legislative Harmonisation

Given its polycontextural function and uncommon core a dual-track strategy involving measures of legislative and non-legislative harmonisation recommends itself for European suretyships' law. Despite calls for full-blown private law codification it is unlikely that ultimately anything more than selective, vertical measures of legislative harmonisation will be adopted in those narrow areas of functional similarity where uniform law produces clear efficiency gains. Whilst such areas, given the heterogeneity identified in this paper, will be rare, EU legislation could be important, for example, in ensuring broader access to credit, or establishing criteria for responsible lending or community reinvestment along US lines.⁹⁷ More common will be measures of non-legislative harmonisation through judicial convergence, a common law turn; and a more effective, sensitive and constitutionally legitimate way of harmonising private law.⁹⁸ Substantively, all that matters is that the courts achieve the same results regardless of which norms, doctrines or procedures they apply in order to come to this end. Even without a constitutionalised element, such an approach could, in *Teubner's* terms, more effectively illuminate the 'blindspots' – seen most graphically in the variable prevalence of suretyships and the variable standards of surety protection – in European suretyships' law. Understood as a process, the adoption of such a strategy would also add the essential sheen of supranational deliberation to what might otherwise be perceived of as a yet another dubious example of European policy-making.

G. Uncommonality

A number of propositions emerge from this survey. Perhaps the most important are the caveats introduced to the understanding of European Private law as

97 U.S. Community Reinvestment Coalition: <http://www.ncrc.org>.

98 A. Colombi Ciacchi, *cited above* note 17, at 296.

a law possessing a clearly identifiable common core, as a body of law susceptible to a broad exercise in codification. Looking at the law in action, and at the hard-case of suretyships, we find substantial divergence rather than convergence, and a picture of legal fragmentation and tension. Amongst the general mood of euphoria connected to the Commission's codification exercise, it is important to stress the fact that Europe's Private law can best be described in terms of a lack of commonality, in terms of the Tower of Babel rather than by reference to an imagined, simplistic commonality.

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