保证责任研究

Research on Suretyship Liability

李明发 著

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作者简介

李明发，男，1963 年 3 月生，安徽省肥东县人。1985 年 6 月安徽大学法律系法学专业本科毕业，获法学学士学位。1988 年 6 月安徽大学法律系民法学专业研究生毕业，获上海社会科学院法学硕士学位。2004 年 6 月中国政法大学民商法学专业博士研究生毕业，获法学博士学位。曾获霍英东基金会高等学校青年教师教学优秀奖、安徽省哲学社会科学优秀成果奖、安徽省优秀教学成果奖。现为安徽大学法学院教授、院长，安徽省学术与技术带头人后备人选。合著《经济法专题研究》等数部作品，在《法律科学》、《政法论坛》、《中外法学》等学术核心期刊发表论文 50 余篇。

序

费安玲*

萌芽且初步成型于罗马法中的保证制度，以及法国、德国、意大利和日本等大陆法系国家继受、发展各自的保证制度所存在着的差异、甚至冲突，为我们对该问题的法学理论与立法研究提供了诸多理性思维的空间，它们所充满的理念之光、制度价值的判断定位、具体制度的构架思考等等，均使我们在分析包括保证责任问题之内的整个保证制度这一相当复杂的问题时得到许多启迪。

在我国法学界努力确立一个不同于传统私法的民事保证制度之立法的数十年探索中，虽然对保证制度研究的论著很多。但是，对保证责任这样一个重要课题的专题研究依然处于比较薄弱状态。因此，安徽大学法学院同仁李明发教授所撰个人专著《保证责任研究》所具有的重要理论价值和对我国私法立法与审判实践的作用便彰显无疑。

本著作的作者以其科学、严谨、平稳、冷静的态度，运用比较分析方法、观点梳理及剖析方法、实证分析方法等研究方法，对作为保证责任之理论和制度设计基础的保证合同、被保证债务的范围与界定、

* 中国政法大学教授，法学博士，博士生导师。

保证人代偿能力与保证责任等基本理论问题进行了详细、系统的梳理和研究，而作者对保证责任的免除、无效保证的民事责任和特殊保证责任的研究给我们带来了许多十分有益的信息。在整个著作中，作者根据自己对保证责任制度的理解构架了研究的体系，并且收集了大量的立法规范、学说观点等，其资料的整合相当到位，其对相关问题的分析有独到见解，作者对保证人的代偿能力与行为能力的关系以及它们与保证合同的关系，都提出了自己的独到见解。例如作者提出：保证人应当是完全民事行为能力人。但是，保证人有无代为清偿债务的能力与保证合同的效力并无关系。因为，就自然人而言，无行为能力人或限制行为能力人不能从事保证活动，主要是因其年龄、智力和精神状态方面的因素，不能清楚地认识到从事保证活动所将产生的法律后果，同时也是为了更好地保护他们的权益，而并非是出于他们不具备相应的财产或者履行能力而致。作者对无效保证责任和特殊保证问题的阐述及其设想，颇具独到见地并具有一定的说服力。

尤其值得一提的是，在我国目前私法学理论研究中存在着的关注国外立法与观点而忽视对国内立法、司法与学说观点进行分析的“厚外薄中流行病”的情况下，本著作的作者在将国外相关立法与学说观点作为分析问题的大视野的同时，始终坚持将自己观察和分析的对象牢牢锁住在对我们国家的相关立法、司法解释和学术界的理论分析上，使得其研究具有坚实的本土基础。

当然，在债务与责任的关系上，还有进行比较法上分析的空间和必要，而且如果作者就其作品中有关我国保证责任制度的立法设想的内容再进一步展开分析的话，将会使其观点的论证更加丰实，其说服力亦会更强些。

中文提要

随着我国社会主义市场经济的建立和发展，市场竞争日趋激烈，风险防范更加重要。我国目前尚未建立起规范的信用制度和体系，采用担保方式不失为防范和减少风险的一种可行措施。在各种担保方式中，保证以其设立之简便和经济而广为采用。虽然我国的民事法律及司法解释对保证均做了规定，但由于该制度具有较强的专业性和技术性，实践中难以把握。多年来的司法实践表明，保证不仅是一种常见的担保方式，而且也极易引发纠纷。因此，加强对保证法律问题的研究，有助于准确地处理保证纠纷，进一步完善民事立法和司法解释。在保证法律制度中，保证责任是其核心，保证纠纷的实质在于保证责任的承担。为此，有必要将保证责任作为研究保证法律问题的重点。

本书通过历史、比较、理论联系实际和实证研究等方法，着重围绕保证责任展开较为深入的分析与探讨。文章结构除前言部分外，共有五章内容。

第一章为保证责任的基本理论问题研究，其内容涉及保证债务与保证责任、保证方式和保证责任的承担方式。通过对债务与责任的历史演变的分析和保证立法体例的比较，指出保证并非无债务的责任，而是债务与责任的统一。关于保证方式，我国民事立法的规定前后有较大变化。《中华人民共和国担保法》（以下简称《担保法》）

确认了一般保证与连带责任保证两种方式，但在保证方式的认定上，当事人未约定或者约定不明时，法律规定为连带责任保证。此种推定反映了立法的价值取向是侧重保护债权人利益。鉴于保证的补充性和无偿性，考虑当事人对保证制度的认知水平，以认定此种情形下之保证方式为一般保证为宜。保证责任的承担方式不同于保证方式。在代为履行与赔偿损失两种保证责任的承担方式中，前者适用条件更为严格，后者具有普遍适用性。保证责任承担方式的确立原则是，有约定者依约定，无约定时依推定。代为履行责任在具备特定条件时，可以转换为赔偿责任。

第二章为保证责任的基础研究。保证责任的承担以保证合同的有效性、被保证债务的合法性和保证人具有代为清偿能力为基础。保证合同的认定，主要从意思表示和形式两个方面加以考察。保证的意思表示可以是明示的，也可以是默示的，但应有保证人愿意承担保证责任的内容。对于保证合同的书面形式，应从鼓励交易出发进行解释。保证合同的效力，依照《中华人民共和国民法通则》（以下简称《民法通则》）及民事单行法律规定综合认定。被保证债务仅限合同所生之债务，其范围应首先遵从当事人约定。保证人具有代为清偿能力是对保证人资格上的要求，对于实现保证的担保功能具有重要意义。保证人是否具有代为清偿能力，主要从时间和内容两个方面判断。由于代为清偿能力具有不确定性，应以保证人实际承担保证责任时的状况判断。从内容上看，财产支付能力是保证人具有代为清偿能力的核心。保证人是否具有代为清偿能力，原则上与保证合同的效力之间无必然联系。

第三章为保证责任的免除研究。保证责任的免除原因较多，本书只研究其中五种情形。第一种情形为保证期间届满，债权人未依法主张权利。保证债务本应适用诉讼时效，法律为其设定保证期间，旨在保护保证人利益。保证期间有约定期间与法定期间之分，前者优先适用，乃为意思自治原则之体现。文章通过实证分析，指出保证期间与诉讼时效之间应为排斥关系。现行司法解释将两者规定为衔

接关系，此种做法违反了法律规定保证期间的本意。第二种情形为主债变更未经保证人同意。在主债务关系中，债务人变更关系到保证人的利益，应征得保证人同意，但主债法定转移为例外。主债内容变更时，应根据其结果是加重还是减轻保证人责任，从而决定是否应征得保证人的同意。第三种情形为债权人放弃物的担保。同一债权既有保证又有物的担保时，只有担保物由债务人提供时，债权人放弃物的担保的，保证人才得以免除保证责任。如何认定债权人的放弃行为，是法律适用的难点所在。对此，保证人有义务举证证明债权人有放弃行为以及对其利益的影响程度。第四种情形为以新贷偿还旧贷。旨在偿还旧贷的新贷款合同，虽然掩盖银行信贷资金的真实状况，但并不违反法律、行政法规的规定，应当有效。在以新贷偿还旧贷情形下，保证人是否得以免除保证责任，应视新旧贷款合同是否均有保证人以及是否为同一保证人而定。第五种情形为保证人在债务人破产时丧失预先追偿权。债务人破产时，保证人承担保证责任的概率增加，且日后难以追偿。此种情形下，债权人既未申报债权又未通知保证人履行保证责任，致使保证人无法就破产财产行使预先追偿权的，保证人对债权人本可在破产财产中受偿的部分，不再承担保证责任。

第四章为无效保证的民事责任研究。保证合同无效时，保证人不承担保证责任，但依法承担过错赔偿责任。此种责任为法定责任，其责任基础为缔约过失。保证合同无效原因有二：一是保证合同因主合同无效而无效；二是保证合同自身无效。在上述两种情形下，保证人的过错程度不同，其所承担的民事责任大小也有别。保证合同无效时，利益受损失方要求有过错的保证人承担赔偿责任应受诉讼时效限制，其时效期间为两年，自主债务履行期届满开始起算。

第五章为特殊保证责任研究。共同保证为保证之特殊形态，以主体复数性和被担保债务的同一性为基本构成要件。共同保证通常分为按份保证与连带保证，但由于它与保证方式具有相容性，故可进一步细分。不同的共同保证下，保证人所承担的保证责任差别较大。

保证监督专款专用并非保证，而是一种无名合同。银行未尽监督专用义务时，应对自己的过错行为承担赔偿责任。由于债务人行为是产生责任的主要原因，且其为最终责任人，所以银行对债权人承担责任后，有权向债务人追偿。注册资金保证是适应我国对国内企业采用实缴资本制需要而产生的一种特殊保证。债务人实际投资与注册资金不符或抽逃转移注册资金的，保证人承担有限保证责任。保证保险是我国近几年来新开展的保险业务，对其性质认定影响到法律适用和法律责任的承担。保证保险具有附从性，但与传统的保证又有所不同，可将其视为一种特殊保证。依据保证保险合同，保险公司主要承担保证责任。保证保险合同无效时，保险公司应当依法承担缔约过失责任，而有关保险条款规定此种情形下保险公司免责，此种做法不符合过错责任原则的要求。

Abstract

Along with establishment and development of the socialist market economy in our country, competition in the marketplace becomes vigorous gradually, and guarding against various risks is of greater importance than before. Since a relatively perfect credit system has not been set up yet in our country at present, a general guarantee system can be a workable method to prevent and reduce risks. Among various kinds of guarantee methods, suretyship is widely employed for its simplicity and easiness to use. Although both of our civil legislation and judicial explanation refer to suretyship, it is still hard for the suretyship system to operate smoothly in practice due to its relatively strong speciality and technicality. Our judicial practice in many years shows that suretyship is not only quite popular, but also easily results in disputes. Therefore, reinforcing research on legal issues of suretyship is beneficial to handle suretyship disputes accurately, and to go a step further to improve our civil legislation and judicial interpretation. In the legal system of suretyship, issues on suretyship liability are of central concern, since the essence of suretyship disputes mainly lies in realization of suretyship liability. For this reason, emphasis should be put on suretyship liability in our research on suretyship system.

By historical, comparative and positive analysis, and linking theories with practice, this dissertation tries to be a relatively thorough study focusing on issues concerning suretyship liability. It consists of 5 chapters in addition to an introduction.

Chapter 1 is a study on basic concepts of suretyship liability, such as suretyship debt, suretyship liability, forms of suretyship, and performance of suretyship liability. Through analyzing the historical evolvement of the concepts of obligation and liability, and comparing different models of legislation on suretyship, the thesis suggests that suretyship is not the liability without debt, but a kind of unification of both debt and liability. Concerning forms of suretyship, our civil legislation has experienced a great change. Guaranty Law of the People's Republic of China confirms two forms, namely general suretyship and suretyship of joint and several liability. The law also stipulates that suretyship of joint and several liability shall be presumed in the absence of an express agreement. This presumption demonstrates a legislative orientation emphasizing protection of the creditor's claim. However, such suretyship should be more appropriately considered as general since suretyship is only of supplementary nature and without any direct charge, and the parties to suretyship usually have only very limited legal knowledge on the issue. Forms of performance of suretyship liability are different from forms of suretyship itself. In the two forms of performance of suretyship liability, namely subrogating performance of the principal obligation and compensation, the former is applied more or less strictly while the latter has a general application. As a principle, forms of performance of suretyship liability should be established according to the relevant agreement, or according to a legal presumption if an agreement is absent or vague. In addition, the liability of subrogating performance may be converted into compensation when certain conditions are satisfied.

Chapter 2 is a research on fundamental issues of suretyship liability. Assumption of suretyship liability is based on validity of a suretyship contract, legality of the debt under suretyship, and the surety's ability of subrogating performance or compensation. Legality of the suretyship contract depends mainly upon two aspects: intention of the parties and the form of contract. Expression of intention can be either explicit or implicit, provided that the surety indicates his willing to assume the suretyship liability. As for a suretyship contract in writing, this should be construed in such a way that relevant transaction can be encouraged. The validity of a suretyship contract should be established according to the General Provisions of Civil Law of PRC and other relevant special legislation on civil law, with all surrounding circumstances under consideration. The range of debts under suretyship is strictly limited to those resulted from the principal contract in question. An essential requirement for the surety's qualification is the ability of the surety to perform the debtor's obligation on a subrogating basis, and this is fundamental for the suretyship system to function as an effective method of guarantee. A surety's ability of subrogating performance should be clarified mainly by considering two factors, namely time and content. Due to the inherent uncertainty of the ability of subrogating performance, it should be judged according to the surety's conditions when the suretyship contract is made. As for the content of the ability, it is of central importance that the surety should be cable of financial or proprietary payment. As a principle, there is no inevitable connection between a surety' ability and the validity of a suretyship contract.

Chapter 3 focuses on exemption of suretyship liability. Among various reasons for exemption, this thesis considers only five of them. The first is failure by the creditor to raise his claim before expiration of the time limit of suretyship. A surety's obligation could have been subject to

the general prescription system, but for the purpose of protecting the surety, the law allows a period of time to be prescribed for suretyship. This period of time or term of suretyship can be decided either by agreement or by legal provisions, and as a reflection of the principle of autonomy of will, the former has priority over the latter in their application. Through a positive research, the thesis suggests that the two systems, namely term of suretyship and prescription, is reciprocally repellent. However, the current judicial explanation provides that these two systems are linked with each other. It seems that this provision goes against the original intention of the legislation on the system of term of suretyship. The second situation under which suretyship liability can be relieved is change of the principal debt without the surety's approval. In the contractual relationship producing the principal debt, alteration of the principal debtor affects the surety's interest directly, and therefore should be consented to by the surety, except where this alteration is legally compulsory. When the content of the principal debt changes, whether approval of the surety is necessary should be decided according to the aggravating or alleviating effect of this change upon the surety's liability. The third situation is that the creditor waives his suretyship claim. When the same creditor's claim is guaranteed by both suretyship and property security, and the creditor abandons the guarantee of security interest, the surety can be relieved from the suretyship liability only where the debtor himself provides the security property. It is a quite difficult issue in judicial practice to affirm the creditor's abandonment. On this the surety should be able to prove the creditor's behavior of abandonment and the extent to which his interest is affected. The fourth situation is where the debtor uses new loan to repay the old borrowing. Although new loan contract aiming at repay the old borrowing could conceal the true condition of the debtor's bank account balance, but it does not

breach the express provisions of law and administrative regulations. In the situation of using the new loan to repay the old borrowing, whether the surety can be relieved from the suretyship liability depends upon whether in both the new and old loan contracts there are sureties and whether the sureties are the same person. The fifth situation is where the surety loses his recourses in advance against the debtor's bankrupt property. When the debtor is bankrupt, the probability at which the surety bears the suretyship liability increases, and it could be also hard for the surety to recover later. Under this situation, if the creditor neither declares his principal claim against the bankrupt property, nor requests the surety to perform his suretyship liability, the surety shall not be liable any more to the part of the debt that the creditor could have been paid by the bankrupt property. This is for the reason that after conclusion of the bankrupt procedure the surety will not be able to exercise his recourses against the bankrupt debtor.

Chapter 4 analyses legal liability resulted from an invalid suretyship contract. When a suretyship contract is invalid, the surety does not bear liability of suretyship, but according to the law, he should still be liable to compensate for losses due to his fault. This is a kind of statutory liability based on negligence in making the contract. There are two reasons for invalidity of a suretyship contract. One is invalidity of the principal contract. Another is invalidity of the suretyship contract itself. The surety's liability under these two situations may differ according to the extent of his negligence. When the suretyship contract is invalid and a person whose interest is affected claims compensation against the negligent surety, this claim shall be subject to the prescription period, which runs for two years commenced at expiration of the period of time for performance of the principal debt.

Chapter 5 concentrates on liability resulted from special forms of

suretyship. One of these forms is co-suretyship, which is basically constituted by plural sureties and identical debt under the principal contract. Co-suretyship is usually divided into proportional and joint and severable. Due to the compatibility of this division with forms of suretyship contract, it can still be further divided. Sureties' liability differs greatly under different co-suretyship. A guarantee by a bank to supervise and ensure the use of funds as agreed is not suretyship, but a kind of non-typical contract. The bank shall be liable for compensation only to the extent that it fails to perform its duty of supervision. Since the debtor's non-performance is the main cause to bring about the liability and the debtor is the ultimately liable person, the bank shall be entitled to recover its compensation from the debtor after its compensation to the creditor. Suretyship on payment of registered capital subscribed is another form of special suretyship, which appears in response to the need of our system of actual payment of the registered capital subscribed for the domestic enterprises. When the debtor's actual investment does not reach the amount he has subscribed, or withdraw and transfer the invested capital illegally, the surety shall bear suretyship liability to a certain extent. Suretyship insurance is a newly opened category of insurance in recent years in our country. How its legal nature is to be defined influences application of relevant legal rules and liability. Suretyship insurance is of auxiliary nature, but it is different from traditional suretyship, and may be regarded as a kind of special suretyship. According to the suretyship insurance contract, the insurance company undertakes primarily suretyship liability. When the contract of suretyship insurance is invalid, the insurance company should according to law bear the liability for its fault in making the contract. However, the provisions in many suretyship insurance policies exempt the insurers' liability under that situation. This is obviously against the spirits of the doctrine of fault liability.

前　言

在市场竞争行为中，利益与风险相伴而生。虽然风险因素是客观存在的，但人们可以运用法律手段防范和化解风险，以实现交易安全，担保不失为一种可供选择的方法。在诸种担保方式中，保证以其特有的制度设计被广泛采用，在民商事活动中发挥重要作用。

一、保证——适用普遍又易生纠纷的担保方式

以设定基础为标准，可将担保主要划分为人的担保与物的担保。前者以保证人的信用和财产为担保的基础，后者以担保物的交换价值为担保的基础。在这两类担保方式中，保证更具有广泛的适用性。这是因为：

1. 从设立手续看，保证具有简便和经济的优点。保证合同仅保证人与债权人就保证之意思表示达成一致即可成立，可单独订立保证合同，也可在主合同上以保证人的身份签字或者盖章。而物的担保则不同，抵押物有些应依法登记，动产质押应转移质物的占有。因此，物的担保的设立手续要求严格，并因此可能产生设立成本。

2. 从设立条件看，保证有更大的适用空间和余地。在物的担保中，债权人是否接受债务人或第三人提供的担保物，主要取决于担保物的价值与被担保债权总额之间的关系。当担保物的价值小于被担保的债权时，基于债权实现安全的考虑，债权人一般不予接受。此