**Laws of Security Interest**

**in Thailand**

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**Preface**

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Chapter 1

Introduction to Security interest

# [1.10]  **Introduction**

When a person lends money to someone or supplies goods on credit, the lender or supplier will generally require some form of collateral security depending on the transaction by the property owned by the borrower or a third party prepared to stand as surety. In addition, some forms of security arise automatically. If the borrower fails to pay for the goods or repay the loan, the lender reimburses himself by enforcing his rights against the property charged or the surety.[[1]](#footnote-1)

Book III of the Thailand’s *Civil and Commercial Code* (CCC), provides that the law of security interest is a distinct type of contract whereby a security interest is provided to a creditor, granting the creditor with a security interest priority over other creditors of the debtor. By the effect of the law, a secured creditor has the right to be paid before an unsecured creditor if the debtor is unable to repay the debt. The creditor may exercise the right to enforce payment through the security interest provided by the debtor. Security interests arising from contract under the CCC are classified into two types, namely:

1. Personal Security refers to a situation where a third party, which may be either an individual or a legal entity, enters into a guaranteed agreement to secure the debtor's obligation to the creditor. If the debtor fails to fulfill the debt, the third party in the capacity of a guarantor agrees to be bound to the creditor to settle the debt on behalf of the debtor. Under this type of security, the creditor has the right to demand payment from the guarantor, who is obligated to repay the debt on behalf of the debtor in accordance with the amount owed.
2. **Property Security** refers to a situation where the owner of a property pledges their own property as collateral to secure their own debt as a debtor, or to secure the debt of another debtor. If the debtor fails to fulfill the payment obligation under the agreement, the creditor may enforce the debt by seizing the property pledged as collateral to satisfy the debt under the contract. This type of security involves the use of property as collateral, but the owner of the property is not personally obligated to repay the debt. The creditor, under this form of security, holds rights over the pledged property only and cannot enforce payment against other assets of the person who provided the collateral.[[2]](#footnote-2)

The rights of a secured creditor are usually prioritized over other creditors’ rights, especially the property security that the rights of secured creditor shall not been affected by execution of other creditors judgement and these collaterals are property rights that attached to the property until the extinction of the property security.

**Supreme Court Judgement no. 2563/2541**

The mortgage is a property right attached to the mortgaged property and will be terminated for 6 reasons according to the provisions of the Civil and Commercial Code, Section 744. Therefore, when the second defendant registered the disputed land and building for mortgage with Bank A before the plaintiff sued to revoke the fraud and if it is heard that Bank A, an outsider, received the mortgage of the disputed land and building in good faith, the mortgage contract will be valid according to the law and will not be terminated even if there is a court judgment to revoke the transaction of sale of the disputed land and building between the deceased and the second defendant.

The rights of a secured creditor in bankruptcy proceedings are optional. If the secured creditor does not participate in the bankruptcy case, they retain the right to enforce the debt by initiating a civil lawsuit to recover from the pledged property, in accordance with Section 110, Paragraph 3[[3]](#footnote-3) of the *Bankruptcy Act* B.E. 2483 (1940). However, a secured creditor may exercise two rights within the bankruptcy proceedings:

1. **Filing a Claim for Payment under Section 96**, which is subject to Section 91 and must be submitted to the Official Receiver within the prescribed period from the date of the final publication of the order for the appointment of the Official Receiver. The claim must be submitted using the prescribed form and include a detailed list of the debt, along with supporting documents or evidence of the debtor’s assets that are either pledged as collateral or in the possession of the creditor.[[4]](#footnote-4)
2. **Exercising Rights under Section 95,** which has no specific form or time limit set by law. Typically, this is done through a petition that outlines the relationship between the creditor and debtor, the grounds for the debt, the amount owed, details of the pledged property, and the purpose of the petition, which is to request the Official Receiver to enforce the pledge or manage the pledged property accordingly. In addition, a secured creditor has the right to file a civil case to enforce the secured property without needing to seek enforcement of preferential rights under Section 95 or obtaining a resolution from the creditors’ meeting beforehand.

**Supreme Court Judgement no. 2647/2566**

The debtor was placed under an absolute receivership order and declared bankrupt by the Central Bankruptcy Court before the plaintiff filed this case against the defendant. However, the debtor’s absolute receivership order does not affect the rights of secured creditors to enforce their rights against the secured property under Section 110, paragraph three, of the Bankrupt Act B.E. 2483 (1940)

As the plaintiff is a secured creditor over the property mortgaged by the debtor, the plaintiff has the right to choose whether to file a claim for debt repayment in the bankruptcy case. If the plaintiff does not file a claim for debt repayment in the bankruptcy case because the secured property is deemed sufficient to cover the debt, the plaintiff retains their mortgage rights over the secured property in the original priority. Since there is no evidence that the plaintiff has submitted applications for repayment of debt in the bankruptcy case, the plaintiff still retains the right to enforce the mortgage through a civil case independently. This does not require seeking enforcement of preferential rights under Section 95 or obtaining a resolution from the creditors' meeting beforehand.

As the mortgaged property was owned by the debtor before bankruptcy and there is no evidence that the creditors' committee passed a resolution to relinquish rights over the land and structures pursuant to Section 145(3), the land and structures remain part of the debtor’s assets in the bankruptcy case under the authority of the defendant, acting as the official receiver. Thus, the plaintiff had the legal authority to file the lawsuit against the defendant in their capacity as the official receiver for the debtor.

In both cases, the secured creditor may either participate in the bankruptcy process or proceed to enforce their security independently, depending on their choice.

However, in seeking payment from the collateral to settle the debt, a secured creditor may only choose one method either filing a claim for payment under Section 96 or exercising their rights under Section 95. The secured creditor must carefully consider which option will yield the greatest benefit, as each of these two provisions offers distinct advantages and disadvantages. Each method carries different implications that may affect the creditor's rights, the process, and the potential recovery of the debt.

For unsecured creditors, there is only one option once the debtor has been placed under the control of the Official Receiver, which is to file a claim for payment within two months, as stipulated in Section 91. The debt must have arisen before the court's order for the appointment of the Official Receiver, regardless of whether the debt has become due or not, or whether there are any conditions attached. Exceptions include debts arising from violations of legal prohibitions, public morals, or debts that are unenforceable by law, as well as debts incurred by the debtor when the creditor knew that the debtor was insolvent. However, this does not include debts that the creditor allowed the debtor to incur to keep the debtor's business running.[[5]](#footnote-5)

# [1.20] **Security interest as the specific contract**

Specific contracts are certain types of contracts in which both their form and mechanism are specifically dealt with, apart from general contract law, in the CCC. In Thai jurisdiction, the provisions relating to specific contracts are established within the section entitled Book III: Particular types of contracts of the CCC. It begins with sales contracts and concludes with partnership and company contracts. Three of the security interest that will be included in this book namely: suretyship, mortgage, and pledge are also established within Book III of the CCC. The main concept one needs to understand from reading this chapter is that a specific contract is a type of agreement where particular terms and mechanisms exist apart from general contract law and juristic acts, which are covered in Books I and II of the CCC. Any term which already exists within the particular contract chapters of the CCC is not applicable to the terms written within the general rules of a contract. This position is taken due to the legal principle of ‘Lex specialis derogat legi generali’, which can be translated as ‘a specific law derogates from a general one’.

# [1.30] **The sequence of application to the parties’ particular contracts**

Examining only some sections of legal provisions in the specific chapter of the CCC may not be sufficient to properly analyse a contract. Four specific concepts are crucial to consideration as well; and they will be discussed in detail, together with each chapter of the CCC relating to this matter below.

## [1.40]  **1. Parties’ intention**

According to the principle of ‘Freedom of Contract’ (which is part of the concept of ‘Private Autonomy’), the law must respect the parties’ intention by excluding its application when matters are already determined by the parties. However, it is generally recognised that upholding public order or morals is more important than honouring the intentions of the parties involved. Thereby, the law will be applied and play an important role in any situation where the pre-agreed matters or intentions are clearly contrary to either public order or morals.

## [1.50] **2. Application of certain Acts**

In the following situations where:

1. a lack of contracting parties’ intention exists in relation to covering all or certain matters of a contract;
2. some or all matters may not be agreed upon otherwise due to a general prohibition by law of either public order or morals;
3. the matter is clearly governed or determined by a specific Act or Acts which provide special rules on certain kinds of contracts;

such Act or Acts must then be considered and applied in the first instance as the special law governing the specific contract.

One should note that certain matters in specific contracts under the CCC may also be regulated by other more specific Acts. Therefore, one must also take those Acts into account, together with the CCC. Examples of those certain Acts include the Act Prohibiting the Charging of Excessive Interest Rates BE 2560 (2017), the Unfair Contract Terms Act BE 2540 (1997), the Protection of Consumers Act BE 2522 (1979), the Consumer Case Procedure Act BE 2551 (2008), and especially for security interest *Business Security Act* BE 2558 (2015).

For example, in the case of an ordinary loan contract between normal individuals, s 654 of the CCC states that,

The rate of interest shall not exceed fifteen percent per year. If the contract specifies higher interest, it shall be reduced to fifteen percent per year.

However, when reviewing the interest rate of a loan agreement, he or she must consult the Act Prohibiting the Charging of Excessive Interest Rates, BE 2560 (2017) as well. S 4(1) of the Act states,

Any person who loans money to another person or commits any act [so as] to conceal a loan of money with any of the following [characteristics] shall be liable to imprisonment for a term not exceeding two years or a fine not exceeding two hundred thousand baht or both:

1. Charging interest at a rate higher than [that] specified by law.

Therefore, creditors who charge interest at a rate higher than the 15 percent per annum rate specified under s 654 of the CCC are liable to either imprisonment or a fine. Although s 654 of the CCC determines that any specific contract specifying a higher interest rate shall then be reduced to 15 percent per annum, s 4 of the Act Prohibiting the Charging of Excessive Interest Rates BE 2560 (2017) introduces the consequences of possible criminal punishment for the charging of higher interest rates; in such a case, this section becomes the statutory provision relating to public order. Therefore, any contract which includes an interest agreement with an interest rate that exceeds the rate specified is void under s 150 of the CCC rather than valid with reduction.

Based on the above example, one could see that not only do certain Acts supplement provisions of the CCC; in certain situations, but they also supplant its application of the Code as the specific law to be applied in these situations. Therefore, a search of the relevant Acts is a necessity after a proper determination of the parties’ initial intentions.

Another example is *Business Security Act* B.E. 2558 (2015), if the debtor provides the business security as a security interest for the creditor, the debtor must follow the instructions of this act as this matter is clearly governed or determined by Business Security Act which provide special rules on certain kinds of contracts.

## [1.60]  **3. Application of specific provisions under Book III of the CCC**

In a scenario where parties conclude an agreement which is categorised as a specific contract in Book III of the CCC, the legal provisions of the relevant chapter of the CCC must be contemplated, especially at a time when parties did not pre-agree on all or certain matters of the contract, or in a situation where such may not be legally agreed upon. Each type of specific contract under Book III has its own distinct characteristics, covering unique rights and duties, that result in different legal effects. Therefore, lawyers must prudently analyse and determine which type of contract the agreement in question covers. If the contract in question relates to a specific contract covered under Book III of the CCC,the provisions of the relevant chapter of the CCC related to that particular contract must be applied. Nevertheless, if the agreement in question does not fit any characteristic of any particular contract of the CCC, Book III cannot be applied; instead, other general provisions must govern such an application. This aspect is discussed below.

According to the Thai CCC, the particular types of contracts are categorised into 22 types which are described as follows:

1. Sales contracts: ss 453–517

2. Exchange contracts: ss 518–520

3. Gift contracts: ss 521–536

4. Lease of things contracts: ss 537–571

5. Hire purchase contracts: ss 572–574

6. Employment contracts: ss 575–586

7. Hire of work contracts: ss 587–607

8. Carriage contracts: ss 608–639

9. Loans contracts: ss 640–656

10. Deposits contracts: ss 657–679

11. Suretyship contracts: ss 680–701

12. Mortgage contracts: ss 702–746

13. Pledge contracts: ss 747–769

14. Warehousing contracts: ss 770–796

15. Agency contracts: ss 797–844

16. Brokerage contracts: ss 845–849

17. Compromise contracts: ss 850–852

18. Gambling and betting: ss 853–855

19. Current account contracts: ss 856–860

20. Insurance contract: ss 861–897

21. Bills: ss 898–1011

22. Partnerships and companies: ss 1012–1273/4.

 Three of the security interest that will be included in this book namely: suretyship, mortgage, and pledge are also established within Book III of the CCC

## [1.70]  **4. Application of Books I and II of the CCC**

Legal provisions under Books I and II of the CCC play important roles when one deals with the issue of contracts. Both general contracts and juristic act provisions under Books I and II fill in the gap when the parties’ intentions are unknown, and when lack of the applicable provisions under certain Acts and specific provisions under its Book III. To summarise, when no specific intention is apparent or no applicable special legal provisions cover the contract, one should realise it is then crucial to revert to and apply general legal provisions.

Since each contract is a lawful and voluntary act with a direct intent to establish juristic relations between persons to create, modify, transfer, preserve or extinguish rights, such a contract is regarded as a bilateral juristic act. Consequently, the provisions regarding ‘Juristic Acts’ in Book I on Title IV (ss 149–193/35) apply to every agreement (including those involving specific contracts), unless a specific provision has already governed the matter.

Firstly, the purpose[[6]](#footnote-6) of such a juristic act must not be either prohibited by law or contrary to public order and good morals under s 150 of the CCC. Two examples worth considering are the Supreme Court’s Decisions No. 2229/2566 and No. 4882/2550.

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| **Supreme Court’s Decision No*.* 2229/2566** |
| Civil and Commercial Code Section 850 states that " A compromise is a contract by which the parties, by making mutual concessions, terminate an existing dispute or prevent the occurrence of a future dispute." When considering the request to withdraw the lawsuit, which is an agreement to withdraw the criminal case, it appears that the defendant must pay the plaintiff 200,000 baht and the plaintiff will withdraw the criminal case, which shows that The text of the withdrawal request is an agreement in which both parties agree to settle the dispute by having the plaintiff withdraw the criminal case. The agreement in the withdrawal request is therefore a compromise agreement in which both parties agree to make concessions to each other to settle the dispute. When it appears that the compromise agreement agrees to the withdrawal request, the plaintiff agrees to withdraw the criminal case, which is a case in which the plaintiff sued the defendant for forging documents and using forged title deeds under Sections 264 and 268 of the Criminal Code, which is a criminal offense against the state, the said agreement is intended to violate public order and good morals, and is therefore void under Section 150 of the Civil and Commercial Code. The plaintiff has no power to sue to enforce the remaining damages under the void contract. |

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| **Supreme Court’s Decision No*.* 4882/2550** |
| A loan contract concluded with the purpose of gambling contains an objective prohibited by law and becomes null and void.  |

Secondly, specific contracts which are not executed correctly in accordance with the form prescribed by law shall be deemed void under s 152 of the CCC. This execution concerns the form of each specific contract (that is discussed in each chapter of this book), which determines the validity of such a contract. However, in specific contracts that specify the term ‘incomplete’ instead of ‘void’ (like loan contracts, for example), a legal discussion surrounds the question of whether such terms are deemed a form of such a contract or not. Besides this factor, form is not similar to evidence; a concept that will be discussed further on.

Thirdly, the law also stipulates that a person must be competent if he or she wishes to execute a juristic act. Within a legal context, the following two types of persons exist: a natural person and a juristic person. Under s 153 of the CCC, a natural person is required to be competent; otherwise, his or her actions could be voidable. A juristic person needs to employ a representative to act on its behalf, according to the objective written within the constitutional instrument. Therefore, the law will not hold the juristic person liable for the consequences of any action which a representative of a juristic person took that was beyond the juristic person’s authority, since a representative will be solely liable for his or her action.

Fourthly, any specific contract shall not be void under s 154 of the CCC if any party, in the recesses of his or her mind, did not intend to be bound by his or her declared intent, unless the other party knew this real intent of the person making the declaration. In other words, if the other party does know of the former party’s real intent, the specific contract in question shall therefore be void under this section.

In addition, any fictitious specific contract which one party makes in collusion with the other party shall be void under s 155 para 1 of the CCC, but the invalidity may not be asserted against a third party acting in good faith and injured by the fictitious declaration of intent. If a fictitious contract is made to conceal another juristic act, the statutory provisions with respect to such a concealed juristic act shall apply under s 155 para 2 of the CCC.

Furthermore, any specific contract entered into by mistake in any essential element of the juristic act shall be void under s 156 of the CCC. Any specific contract entered into by mistake about the quality of a person or property, procured by fraud or formed under duress, shall also be voidable under ss 157, 159 or 164 of the CCC.

Finally, there are provisions of the CCC regarding void and voidable acts, conditions and time, the period of time and the period of prescription that pertains to specific contracts, which particularly applies when specific provisions are not prescribed.

For instance, in relation to the period of prescription, if a specific contract provision already determines its own period of prescription concerning the matter, such a provision shall be directly applied to the case. By way of example, in a sales contract in accordance with Book III of the CCC, if any sold property appears to be defective, no action for liability for such defectiveness may then be brought after one year has elapsed from the time of discovery of the defect in question, according to its s 474. Nonetheless, in cases where certain matters are not governed by a specific provision with regard to prescription, the general provision of prescription under Title VI of Book I must be applied instead. To illustrate, there is no specific prescription laid down for loan for consumption agreement, if a legal action arose concerning this matter, then the general prescription period under s 193/30 of the CCC would be ten years from the date the creditor could enforce his or her right.

In addition, since specific contracts establish rights and obligations between parties as well as ordinary agreements, provisions under Book II of the CCC (including the effect of obligation and cessation of an obligation) will then govern those rights and obligations in certain scenarios.

For example, concerning the place where the performance of obligation takes place, s 324 of the CCC states,

When intent is not specifically declared with respect to the place where the performance should take place, the delivery of a specific thing [shall] be effected at the place where such thing was located when the obligation arose, and the performance of other obligations [shall] be effected at the current domicile of the creditor.

Suppose that there is a loan for consumption agreement in which the borrower agrees to return the borrowed money at a shopping mall, the borrowing party has to follow that condition strictly. Nonetheless, if there is no such agreement indicating where to return any such object, it is necessary then to apply the law related to the effect of obligation under s 324 of the CCC since this particular law stipulates that the return of the loan has to take place at the domicile of the creditor.

Another example relates to the default of the debtor. S 205 of the CCC states that,

The debtor shall not be in default for as long as performance is not effected as the result of any circumstance for which he or she is not responsible.

By way of example, in a sales contract, Mr. A agreed to sell his computer to Ms. B and to deliver it to her in three days’ time. Unfortunately, once the deadline had expired, very heavy rain came, thus causing a big inundation and tremendous traffic congestion. Mr. A could not deliver his computer on time; however, Mr. A was not in control of such an event, which would be understood as a ‘force majeure’[[7]](#footnote-7) that Mr. A was not responsible for. As a result, Mr. A would not be considered in default.

To illustrate further, concerning the partial or different performance of the debtor, s 320 of the CCC states that,

A creditor shall not be required to accept partial performance or any other performance that differs from that due to him or her.

Once the deadline has been reached, the debtor must fully perform his or her obligations; and he or she cannot force the creditor to accept partial performance or any other performance unless the parties agreed otherwise. For example, in a sales contract, the seller agreed to deliver five cupcakes to the buyer within the day. The seller shall be obligated to deliver five cupcakes to the buyer within that day. However, if the seller’s company could only bake two cupcakes on that day, by virtue of s 320 of the CCC, the seller may not then coerce the buyer to accept only two of them (i.e. partial performance). On the other hand, in a case where the seller did not bake any cupcakes that day, the seller could not force the buyer to accept his or her brownies instead (i.e. different performance).

In addition, one must comprehend that the legal provisions under Books I and II of the CCC, especially provisions concerning general contract and juristic act provisions and ones regarding the effect and cessation of an obligation would be considered general law. Those legal provisions must be applied to every contract whether it is a specific contract under Book III or not, especially when no specific provision exists which governs the matter. Therefore, those provisions must always be considered alongside specific provisions of specific contracts and be applied when needed.

To summarise, the sequence of application to the parties’ specific contracts are shown in the following diagram:



Based upon this diagram, after identifying the type of contract in question, lawyers must initially determine the parties’ intention in various matters of the contract. The parties may agree on every matter concerning their agreement, some of it or even none of it. For matters which the parties have not pre-agreed on, or may not agree on due to aspects of such arrangements being expressly forbidden by either public orders or morals, it is then essential to move on to the next step. If certain Acts govern such a contract or some of its terms, those Acts must be considered and enforced. Subsequently, for contract terms which certain Acts do not govern, if the contract in question is categorized as one of the particular contracts referenced in the Code, this specific provision must then be considered. In cases in which such a contract is not a specific contract, it is crucial to examine the general contract and juristic act provisions under Books I and II of the CCC. In addition, provisions concerning effect and cessation of obligations under Books I and II must be taken into account at every stage of the consideration process.

 In this book, the author aims to elaborate on each type of security interests under the CCC, which are suretyship, mortgage, and pledge, and the *Business Security Act* B.E. 2558 (2015) which will be connected to the second and third stage of the diagram. The matters that will be expounded on are each security interest’s characteristic, its purpose or objectives, its subject matter, the distinct rights, obligations and liabilities, the explanation of significant legal terms, the extinction of the contract, the prescription period, examples and the Supreme Court’s Decisions, and the highlighted contemporary issues that will introduce some relevant controversial concerns or remarkable novel considerations, all of which one should understand properly. Without further ado, these security interests are presented and explained in the following chapters.

# **Chapter 2: Suretyship**

## **Introduction to Suretyship**

In obligation relations, a debtor is bound by law to fulfill their obligations to the creditor, as this is a general principle of obligations law. This aligns with Section 194 of the Civil and Commercial Code, which states that

“By virtue of an obligation, the creditor shall be entitled to claim performance from the debtor. The performance may also include refraining from a certain act.”

Along with section 214 which states that

“Subject to the provision of section 733, the creditor shall be entitled to demand satisfaction out of the entire property of the debtor including any money and other property due to the debtor by third parties.”

To interpret within this context, all assets owned by the debtor may be regarded as collateral for the fulfillment of their obligations.[[8]](#footnote-8)

However, in some cases, a debtor may lack sufficient assets to fulfill their obligations to the creditor, or even if there are enough assets, those assets may be subject to enforcement by multiple creditors. Consequently, the likelihood of the creditor receiving repayment decreases. Therefore, to increase confidence and the chances of the obligation being performed by the debtor, the creditor is entitled to demand additional collateral from the debtor's existing assets. The form of collateral that the debtor must provide to the creditor can vary, such as personal guarantees or asset pledges, depending on the creditor's discretion.

Personal guarantees, however, take one specific form: “suretyship”. Suretyship occurs when a third party agrees to be bound to the creditor to perform the debtor's obligation if the debtor fails to fulfill their own obligation, despite having no direct interest in the said obligation. This matter will be discussed further in the chapters on Suretyship Law under the Civil and Commercial Code.

## **General Provisions**

 According to the Civil and Commercial Code, the general provisions regarding suretyship are explained through section 680 – 685/1, as hereinafter;

### **1. Definition and elements of suretyship contract**

The meaning of suretyship is clearly defined in the Civil and Commercial Code, section 680, paragraph one which states that

“A suretyship is a contract by which a third party, called the surety binds himself or herself towards the creditor to perform an obligation when the debtor fails to perform such obligation.”

Since the above section defines that suretyship is a contract, the general provisions of contractual transactions and obligations must be applied to assess the validity of a suretyship contract too[[9]](#footnote-9). According to the definition, a suretyship contract must possess the following essential elements:

**1.1 Third party as a surety**

A surety must be a third party. A third party refers to individuals who do not have any direct interest in the obligation between the creditor and the debtor. By this, it means that to form a suretyship contract, there must always be three parties involved: the creditor, the debtor, and the third party. Therefore, the debtor cannot enter into a suretyship contract for their own obligation. If the debtor wishes to provide self-guarantee, they must opt for asset-based collateral which is mortgage or pledge. Furthermore, even if there is plurality of debtors and creditors under the same source of obligation, the joint debtors cannot guarantee each other's obligation. This is because both the creditor and the debtor have an interest in that source of obligation, hence they are not considered as third parties. Additionally, allowing the debtor to guarantee their own obligation would contradict the purpose of suretyship, as it does not increase the creditor's security for the debtor's performance because the creditor can already demand performance from the principal debtor.

A third party who can enter a suretyship contract may be a natural person or a juristic person. However, in the case of a juristic person, it is necessary to consider the objectives of that juristic person as to whether it has the authority to enter into a suretyship contract. If it lacks the authority to do so, the suretyship contract made will not bind the juristic person.

Additionally, in guaranteeing a particular obligation, there may be one or more sureties. The use of the term “a third party” in the section does not imply that there must be only one surety for a particular obligation.

**1.2 Existence of obligation between the creditor and the debtor**

The contract of suretyship can be established when there is an obligation between the creditor and the debtor, referred to as the “principal obligation”, and since the suretyship contract is merely an “accessory agreement” to the principal obligation, its validity depends on the completeness of the principal obligation. The principal obligation or agreement that is guaranteed can be any type of obligation, such as sale contracts, loan agreements, lease agreements, contracts for services, or torts etc.

However, in cases which the principal obligation specifies that the debtor must perform specific acts, for instance, Mrs. A (creditor) hired Mrs. B (debtor) to sing at an event. It is impossible to provide a suretyship. Nevertheless, if such cases have set compensation for any damage caused by the debtor's failure to perform their obligation, such as the employment contract which Mrs. B agrees to pay damages to Mrs. A in the event of a breach of contract. The obligation to pay for damages is not considered a personal obligation that must be performed exclusively by the debtor. Therefore, it can be guaranteed with the contract of suretyship.

Furthermore, there are laws that prohibit an employer from requiring suretyship for work or damages resulting from an employee's performance, unless the nature or conditions of that work is that the employee must be responsible for the employer's money or property, which may cause damage to the employer. The nature or conditions of the work for which suretyship can be required from the debtor must comply with the announced regulations.[[10]](#footnote-10)

**1.3 Commitment of the surety to the creditor of performing the obligation providing that the debtor fails to do so**

For a third party to become a surety, they must bind themselves to the creditor with the objective of performing the obligation to the creditor if the debtor fails to do so. If a third party binds themselves to another person who is not the creditor or does not bind themselves for the debtor's sake, it will not be a suretyship but rather an ordinary contract, which the contracting parties must enforce according to the agreement, without applying the provisions regarding suretyship. Therefore, when a surety binds themselves for the performance of another's obligation rather than their own, their liability is secondary and making them a secondary debtor. Accordingly, if the debtor fails to perform their obligation, the surety must perform it to the creditor. However, once the debtor performs their obligation to the creditor, the surety is relieved of liability.

In addition, a suretyship contract does not necessarily require the debtor's consent to be valid. This is because a suretyship contract is a binding agreement between an external party (a third party) and the creditor. Therefore, if the debtor fails to perform their obligation, the surety can invoke the fact that the debtor's consent was not required to refute the debtor's refusal to perform the obligation to the creditor. Similarly, if the surety has already performed their obligation to the creditor and seeks reimbursement from the debtor, the debtor cannot refuse to perform the surety by claiming they did not consent to the suretyship contract.

**1.4 Clear specification of guaranteed debt or contract on the suretyship agreement**

Apart from the three elements mentioned in the first paragraph of section 680, a suretyship contract must also include another significant element as stated by law in section 681, paragraph three which states that

“A contract of suretyship shall clearly specify a secured obligation or contract, and the surety shall be liable only for the specified obligation or contract.”

The law requiring the suretyship contract to specify the obligation or contract being guaranteed clearly aims to ensure that the surety knows precisely which obligation they are guaranteeing. The implication of this is that the surety will be liable solely for the obligation explicitly specified in that suretyship contract. It is imperative to always specify the obligation or contract being guaranteed in the suretyship contract, regardless of whether the obligation guaranteed has already occurred, is in the future, or is conditional.[[11]](#footnote-11)

### **2. Written evidence of suretyship contract**

Suretyship contract does not have a fixed form like some other legal documents. Though for its enforcement, it is prevalent to be made in writing according to the Civil and Commercial Code, section 680, paragraph two which states that

“A contract of suretyship shall not be enforceable by action unless there is any written evidence signed by the surety.”

Since there is no law prescribing that the contract of suretyship must be made in form, the suretyship contract is therefore a contract without form. It can be valid whether agreed verbally or in writing. Despite that, as stated in paragraph two of section 680, the law stipulates that a suretyship contract is unenforceable if it is not evidenced in writing. In other words, to enforce a suretyship contract, it is essential to have written proof signed by the surety. Additionally, the creditor is not required to sign the contract.

**Supreme Court Judgment No**. **9742/2539**

Suretyship contract requires only written evidence signed by the surety to be enforceable. The creditor or plaintiff does not have to sign as well. The second defendant made a suretyship contract with the plaintiff in writing and signed it. Therefore, it is effective according to law. The plaintiff does not need to sign. Even though the person signing on behalf of the plaintiff has no authority. This is considered as the plaintiff had not signed the suretyship contract. However, the contract was not prejudiced and was effective according to law.

The form of contract and evidence of litigation are different matters. If the contract fails to be made in the form prescribed by law, that contract is void according to section 152.[[12]](#footnote-12) However, a suretyship contract is a contract that does not have a specific form. The requirement of written evidence in this section is also not considered as its form because even if it is not documented, the contract of suretyship remains valid. It just cannot be enforceable.

The written evidence does not have to be in the form of a contract and does not have to be made directly to the creditor. It can be made to anyone and can be made without the intent to use it as evidence[[13]](#footnote-13), but it must always have the surety's signature. It may or may not have the signatures of the creditor and debtor. However, when the documents cited as evidence are presented together, there must be a statement showing that the surety who signs the document binds himself or herself to the creditor to perform the obligation when the debtor fails to do so. Accordingly, the said document is therefore a suretyship contract.

**Supreme Court Judgment No**. **414/2481**

The death of the mortgagor and mortgagee and the heirs of both parties assume the right to continue as the mortgagor and mortgagee. This does not have the characteristics of a novation as the law. When the mortgagor dies, the heir of the mortgagor goes to request a transfer of inheritance and signs as owner on the title deed of the mortgaged land. And give the title deed to the mortgagee. Therefore, it is considered that the heir of the mortgagor accepts the condition of the claim under the mortgage contract. The interruption of the prescription is a penalty to the debtor and is a penalty to the surety. The contract has a message that if the price of the land is not enough for the principal obligation of the mortgage, the surety will agree to pay until the principal obligation is paid. It is considered a suretyship contract.

**Supreme Court Judgment No**. **2742/2535**

The plaintiff filled the information in the loan agreement and the suretyship contract, which the first defendant (or debtor) and the second defendant (or surety) had already signed, deviated from the truth without the consent of both defendants. Therefore, the loan agreement and the suretyship contract is a false document. Even though both defendants testified that the first defendant borrowed a total of 50,000 baht from the plaintiff and the second defendants gave a suretyship of 5,000 baht to the plaintiff. The plaintiff could not claim the loan agreement and the suretyship contract as evidence in the lawsuit to enforce both defendants to perform their obligations. It was held that the loan and the suretyship had no written evidence.

### **3. Obligations which can be guaranteed by suretyship**

According to the Civil and Commercial Code, obligations which can be guaranteed by suretyship are regulated in section 681, as hereinafter;

**3.1 Valid obligations**

Section 681, paragraph one states that

“A suretyship may exist only on a valid obligation.”

The above provision emphasizes the principle that a suretyship contract is an accessory contract designed to secure the performance of the principal obligation. The validity of the accessory contract depends on the validity of the principal obligation. Therefore, if the principal obligation is invalid, the suretyship contract will also be invalid, meaning that the obligation cannot have suretyship. Consequently, the principal obligation eligible for suretyship must be a valid obligation. By “valid obligation,” it means the obligation must not be void or voidable for any reason, such as juristic act with any purpose which is expressly prohibited by law or is impossible or is contrary to public order or morals[[14]](#footnote-14), juristic act which is not executed correctly in accordance with the form prescribed by law[[15]](#footnote-15), juristic act which does not comply with the statutory provisions governing capacity of persons [[16]](#footnote-16), juristic act with hidden intention which the other party knows such real intent of the person declaring[[17]](#footnote-17), juristic act with fictitious Intention[[18]](#footnote-18), juristic act which is acting under a mistake in any essential element of the act[[19]](#footnote-19), juristic act which is acting under a mistake about the quality of a person or property[[20]](#footnote-20), juristic act which is procured by fraud[[21]](#footnote-21) or juristic act made under duress[[22]](#footnote-22).

**Supreme Court Judgment No**. **10419/2557**

The Civil and Commercial Code, section 681 states only that a suretyship can be given when it is a suretyship of a valid obligation. There is no law stating that when making a suretyship contract, the obligation must not already be valid. Therefore, even when the plaintiff and the second defendant and the third defendant entered into a suretyship contract for the loan of the first defendant, the loan contract was not complete because the plaintiff has not yet delivered the loan to the first defendant according to section 650, paragraph two, but when the second defendants and the third defendant accept that the plaintiff later delivered the loan to the first defendant in full, the debt under the loan contract is a valid obligation. It can be secured by a suretyship contract.

The Supreme Court ruled that, when concluding a suretyship contract, it is not necessary for the principal obligation to be valid at the time of its formation. If the principal obligation becomes valid later, after the suretyship contract has been made, the suretyship remains enforceable.

Furthermore, regarding obligation that is voidable, it must always be remembered that the obligation arising from voidable contract is considered valid until it is rescinded[[23]](#footnote-23) and if a voidable obligation has been rescinded, it is deemed to have been void from the beginning[[24]](#footnote-24). Therefore, the voidable principal obligation can have suretyship as long as it has not been rescinded. In contrast, if that voidable obligation has already been rescinded, there can no longer be a suretyship for such obligation. This is because the principal obligation has become invalid.[[25]](#footnote-25)

However, the law provides that some voidable obligations can have suretyship even after such obligation has been rescinded. This principle appears in section 681, last paragraph which states that

“An obligation arising from a contract which does not bind the debtor because it has been entered into by mistake or owing to incapacity may be validly secured if the surety was aware of such mistake or incapacity at the time of entering into the contract.”

From the above provision, it can be considered that only obligations resulting from juristic acts performed by the debtor who has been entered into by mistake about the quality of a person or property or owing to incapacity are protected by law according to section 681, last paragraph. It is because if there is a mistake in any essential element of the juristic act, that obligation will automatically become void, and if it is the creditor’s mistake about the quality of a person or property or the creditor’s incapacity, it must be considered following the general provision which is a voidable principal obligation can have a suretyship as long as it has not been rescinded.

The incapacitated debtor in this section means a minor[[26]](#footnote-26), a person adjudged incompetent by a court[[27]](#footnote-27), a person of unsound mind who has not been adjudged incompetent by a court[[28]](#footnote-28) and a quasi-incompetent person[[29]](#footnote-29). Furthermore, the element of time specified by law must be considered as well. The surety must know about the mistake or incapacity at the time they enter into by mistake or owing to incapacity.

When there are all the elements mentioned above, an obligation arising from juristic act of the debtor who enters into by mistake or the debtor’s incapacity and the creditor aware of such mistake or incapacity at the time of entering into the contract, that obligation can have a valid suretyship even if it is a voidable contract which has already been rescinded by the debtor or the interested person. Consequently, the surety continues to be bound by the creditor under the contract of suretyship. If the surety is sued for liability, they cannot raise the invalidity of the principal obligation against the creditor according to section 694.

**3.2 Future or contingent obligations**

Section 681, paragraph two states that

“A future or contingent obligation may be secured for the event in which it would have effect; provided, however, that the objective of the creation of such secured obligation, the characteristic of the obligation, the maximum secured amount of money, and the period of the creation of the obligation to be secured shall be specified except for a suretyship given for a series of obligations under section 699, in which case the period may not be specified.”

Besides a valid obligation according to the first paragraph of Section 681, a future or contingent obligation can also be secured, i.e., have a suretyship. A “future obligation” refers to an obligation that has not yet arisen at the time of the suretyship but may become valid in the future. A “contingent obligation” refers to an obligation with a condition precedent, which will become valid only when that condition is fulfilled.[[30]](#footnote-30) Whether it is a future or contingent obligation, both must include the following four details:

The first one is “the objective of the creation of such secured obligation” which means specifying the purpose of the principal obligation being secured e.g., to overdraft or make a withdrawal more than the account balance, for the purpose of furthering educational funding, for operational expenses in conducting business, to purchase goods on credit etc. This is to limit the surety's liability to actions within the scope of the specified objectives. The surety shall not be held accountable for the debtor's actions beyond this scope.

The second one is “the characteristic of the obligation” which means type of the principal obligation the debtor incurred e.g. overdraft contract, scholarship contract, loan contract, lease contract with conditions etc.

The third one is “the maximum secured amount of money” which means the maximum amount of money that the surety is willing to be liable to the creditor if the debtor fails to perform their obligation.

The last one is “the period of the creation of the obligation to be secured” which shall be specified to limit the surety's liability in terms of time so that the surety knows how long he or she must bind toward the creditor. If the debtor acts anything resulting in more obligation after the specified period, the surety shall not be liable for such obligation. However, in the case of a suretyship given for a series of obligations under section 699 e.g., a suretyship for an employee’s performance in working, the period of the creation of the obligation to be secured may or may not be specified.

When all four details above have been fully specified, a future or contingent obligation with conditions that may come true can be secured, i.e., have a suretyship. Conversely, if they are not fully specified, such a suretyship will be void under Section 685/1 because it is an agreement about a suretyship contract that is contrary to paragraph two of Section 681.

**Supreme Court Judgment No**. **2715/2538**

Suretyship is when a third party called the surety binds himself to the creditor to perform an obligation when the debtor fails to do so. This can be done for both incurred or existing obligation and future obligation. Regardless of whether the surety was aware or not at the time the debtor incurred the obligation, if the obligation is valid, the surety shall bind himself to the creditor. The second defendant actually entered into a suretyship contract. Even though they didn't do it at the same time with the loan agreement, it is still effective. This is because there is no law requiring that a suretyship contract must be entered into at the same time as a loan agreement. When the loan between the plaintiff and the first defendant who has the second defendant as a surety, has been borrowed and received, it is therefore a valid obligation.

### **4. Surety of a surety**

A surety can have a third party to act as their surety, as permitted in the Civil and Commercial Code, section 682, paragraph one which states that

“A person may agree to be a surety of a surety, meaning to stand as a surety for another surety.”

 By “a surety of a surety”, it means a surety of a debtor’s surety which is when another third party binds himself or herself towards the creditor to perform an obligation when the primary surety fails to perform such obligation. For example, Mrs. A (the debtor) entered into a loan contract for the sum of 10,000 Baht with Mrs. B (the creditor). Meanwhile, Mrs. C binds himself to Mrs. B, stating that if Mrs. A fails to perform the obligation, Mrs. C will perform it. Mrs. C then becomes the surety. Later, Mrs. D also binds himself to Mrs. B, stating that if Mrs. C (the primary surety) fails to perform the obligation, Mrs. D will perform it. This makes Mrs. D become a surety for the performance of Mrs. C who is the primary surety. Mrs. D is therefore the surety of the surety.

It is also noteworthy that another third party shall bind themselves to the creditor to be a surety of a surety. If he or she binds themselves to other people who are not the creditor such as a debtor or a surety, they will not be considered as a surety of a surety. Yet, the agreement they made is a simple contract that can be enforced according to the intentions of the contracting parties.

Moreover, a surety of a surety shall not be jointly liable with the primary surety which is different from the case of several sureties since the several sureties shall be jointly liable like a joint debtor.

**Rights and duties of a surety of a surety**

Since there is no law specifically stipulating the rights and duties of a surety of a surety, the provisions of suretyship shall apply, mutatis mutandis, to this matter e.g., the rights to have the creditor demand the performance from the debtor prior the surety according to section 688-690 or the right of recourse against the primary surety as debtor when a surety of a surety has already performed the obligation.

It is significant to answer a query that when a surety of a surety has performed the obligation, whether he acquire the right of subrogation from the creditor to recourse against the principal debtor under section 693 or not. As for this issue, there are two opinions as follows.

Firstly, Arnon Sriboonroj said that even though a surety of a surety is in the position of the surety, but such suretyship is another layer securing the suretyship of the primary surety. Accordingly, if a surety of a surety has already performed the obligation to the creditor, he or she will have the right of recourse only to the primary surety as the debtor of a surety of a surety. This is because section 693 only specifies that the right of recourse is to be used against the principal debtor who is not the debtor of a surety of a surety. Therefore, a surety of a surety does not have the right of recourse against the principal debtor. However, a surety of a surety can acquire the right of subrogation from the creditor under section 229 (3) since a surety of a surety has performed the obligation for which he or she is bound with or for other persons and which he or she has an interest in the performance.[[31]](#footnote-31)

Secondly, Pitikul Jeeramongkolpanich said that even though a surety of a surety does not bind directly to be liable and the debtor does not give consent, the contract between a surety of a surety and the creditor is still beneficial to the debtor. Consequently, a surety of a surety is also known to be bound for the debtor’s obligation. He or she can use the right of recourse under section 693 and can acquire the right of subrogation according to 229 (3).[[32]](#footnote-32)

### **5. Several sureties**

It is possible for a principal obligation to have several sureties according to the Civil and Commercial Code, section 682, paragraph two which states that

 “If several persons enter a suretyship commitment for the same obligation, they are liable as joint and several debtors even if they do not assume suretyship jointly.”

Several sureties are when two or more people bind themselves to the same principal obligation to perform the obligation when the debtor fails to do so. These multiple persons may intend to enter the suretyship as joint sureties or may secure the obligation at different times without the intent to be joint sureties.

**The liability of several sureties**

Essentially, the law stipulates that several sureties are liable as joint sureties and it may be considered according to the juristic relation in 3 relations as follows:[[33]](#footnote-33)

The first relation is the juristic relation between several sureties and the creditor, this must be considered as it is specified in the suretyship contract. However, if it is not specified in the contract, the several sureties are generally liable to the creditor as joint sureties. The creditor has the right to demand performance of the entire obligation or part performance from any sureties and these several sureties shall remain bound until the obligation is performed completely.

The second relation is the juristic relation between several sureties. If it has not already been specified in the suretyship contract, among the sureties themselves, they must share equal liability.

The third relation is the juristic relation between several sureties and the debtor. When the surety has performed the obligation to the creditor, the surety will acquire the right of subrogation from the creditor under section 229 (3) to demand the other sureties to perform their obligation to himself or herself. The surety may also have the right of recourse against the principal debtor as another way as well.

### **6. The scope of liability of the surety**

The foundational scope of the surety’s liability is clearly outlined in the Civil and Commercial Code, section 683 which states that

“Indefinite suretyship shall extend to interest and compensation due by the debtor and other accessory charges of the debt.”

The extent of the surety's liability is essentially based on the agreement in the suretyship contract between the creditor and the surety, which such agreement shall not be contrary to the law or public order and good morals. However, if there is no specified scope of the surety’s liability in the suretyship contract, the liability of the surety shall essentially not exceed that of the principal debtor. Exceptionthere are some cases which the surety's liability exceeds that of the principal debtor according to law e.g., the last paragraph of section 681 states that

“An obligation arising from a contract which does not bind the debtor because it has been entered into by mistake or owing to incapacity may be validly secured if the surety was aware of such mistake or incapacity at the time of entering into the contract.”

Or the first paragraph of section 681/1, states that

“Any agreement requiring a surety to be liable in the same manner of a joint and several debtor or in the capacity of a joint and several debtor shall be void.”

However, the surety can limit their liability. If the obligation is in the form of debt, it must be clearly specified that the surety may secure for how much amount or limit to the principal debt excluding its interest, or if it is an obligation from work (employment of the employee), the surety may be liable only for damages arising from the debtor's negligence.

In addition, if the liability of the surety is not specifically limited, the extent of the surety's liability shall be under section 683 which stipulates that “Indefinite suretyship shall extend to interest and compensation due by the debtor and other accessory charges of the debt.” In other words, if there is no determined limitation on the surety’s liability, the surety with indefinite liability shall be liable for the principal obligation, interest on that principal obligation that the debtor agreed to pay, and the compensation which includes damages that the debtor is liable to the creditor and other expenses due to the debtor’s arrears of obligation e.g., the expense of the attorney’s claim which the plaintiff has already paid is not the direct result of the defendant’s action so the defendant is not liable for this expense.

**Supreme Court Judgment No**. **1346/2517**

When the shophouse, which is the object of rent, was burnt down. A lease is suspended following section 567 of the Civil and Commercial Code. The leased property was lost because it was burned down through no fault of the plaintiff (lessee) and the plaintiff has not yet used the leased property in full for the lease period. When the lease does not specify an exception that the lessee has no right to recover part of the rent from the lessor in the case that the rental property is lost for any reason, the plaintiff has the right to recover the rent for the shophouse that was paid to the defendant who is the lessor in proportion to the period of time the plaintiff did not receive any benefit from the rented property. (General Meeting No.7/1974) The lawyer’s claim expenses which the plaintiff has paid were not a direct result of the defendant’s actions, so the defendant is not liable to paying the expenses.

 Moreover, the law also stipulates the surety's liability for costs of action in section 684, states that

“A surety shall be liable for the costs of action that are reimbursable by the debtor to the creditor. However, if the plaintiff filed the action without first demanding performance from the surety, the surety shall not be liable for such costs.”

 From this provision, it means that the general liability of the surety covers the costs in court arising from the creditor's lawsuit against the debtor. However, if the creditor files the debtor without demanding performance from the surety first, the surety is not liable for the incurred of such costs. If later the suretyship contract is enforced and the surety does not perform the entire obligation of the debtor including interest, compensation and accessory charges, the debtor shall still be liable to the creditor for the remaining amount of obligation according to section 685.[[34]](#footnote-34)

### **7. The liability of the debtor to the creditor for the balance of the obligation remaining**

 If there is the balance of the obligation remaining, the debtor shall be liable to the creditor according to the Civil and Commercial Code, section 685 which states that

“If, on enforcement of the contract of suretyship, the surety does not satisfy the entire obligation of the debtor, including interest, compensation and accessories, the debtor shall remain liable to the creditor for the balance of the obligation remaining.”

If the surety has fully performed an obligation to the creditor when the debtor failed to do so, the obligation, as per the principal contract between the creditor and the debtor, is therefore extinguished. However, if the suretyship contract is already enforced but the creditor still has not received the performance entirely, including interest[[35]](#footnote-35), compensation[[36]](#footnote-36), and accessories[[37]](#footnote-37), whether because the surety has limited their liability, the surety is unable to perform wholly, or the creditor does not wish to demand performance from the surety anymore, then the obligation shall not be extinguished.[[38]](#footnote-38) The debtor shall remain liable to the creditor for the outstanding balance of the remaining obligation unless the debtor has other reasons to raise against the creditor for refusing to perform the obligation. For example, if the remaining loan debt has been extinguished, if there is no written evidence for a lawsuit, or if the case is precluded by prescription.[[39]](#footnote-39)

**Supreme Court Judgment No. 391/2561**

 Although the plaintiff accepted the part performance from the surety, when there is still remaining obligation, the first defendant who is the principal debtor must remain liable to the creditor until the obligation is fully performed according to section 685.

**Supreme Court Judgment No. 893/2540**

 The release from the secured obligation of the surety will result in the release of the first defendant who is the principal debtor. This is in accordance with section 685 i.e. the debtor will be released only the part of obligation the surety has performed. As for the remaining obligation, the first defendant who is the principal debtor is still liable to the creditor.

### **8. Void agreements regarding suretyship contract**

 Section 681/1 paragraph one and section 685/1 determine agreements in relation to suretyship which must be considered void and unenforceable. These agreements are delineated hereinafter;

**8.1 Agreement requiring a surety to be liable in the same manner of a joint and several debtor**

Section 681/1 states that

“Any agreement requiring a surety to be liable in the same manner of a joint and several debtor or in the capacity of a joint and several debtor shall be void.

The provision of paragraph one shall not apply to the case where a surety is a juristic person which agrees to bind itself to be liable as a joint and several debtor or in the capacity of a joint and several debtor. In this case, the surety which is a juristic person shall not have the rights stipulated in section 688, section 689 and section 690”

The purpose of this provision is to protect the surety to only be a secondary debtor who will perform the obligation to the creditor when the principal debtor fails to do so. For this reason, the law prohibits the creditor and the surety from agreeing to make the surety liable like the principal debtor. By section 681/1, there are two cases to be considered:

Firstly, if a surety is a natural person, they cannot agree otherwise to be liable like a joint debtor or as a joint debtor. If the agreement violates this provision, that agreement is void. Plus, it must be noted that only such agreement requiring a surety to be liable in the same manner of a joint and several debtor is void, not the entire suretyship contract. Secondly, if a surety is a juristic person, they can agree to be liable like a joint debtor or as a joint debtor and that agreement is not void but the surety who is a juristic person will not be able to exercise the rights under section 688, 689, and 690 as designated by law in the second paragraph of section 681/1. However, the status of being a second-class debtor of a juristic person who agrees to be liable like or as a joint debtor does not change to a principal debtor. The surety can still exercise other rights as provided by law because only the rights under section 688-690 are prohibited under section 681/1.

However, Section 681/1, paragraph one, is a provision that was amended by the Civil and Commercial Code Amendment Act (No. 20) B.E. 2014, which came into effect on February 11, 2015. This amendment therefore does not have a retroactive effect to the suretyship contracts made before February 11, 2015. Accordingly, even though the suretyship contract has an agreement that the surety must be liable like or as a joint debtor, if such contract was made before February 11, 2015, then that agreement is enforceable and does not become void. In the case of a surety which is a juristic person who can agree to be liable like or as a joint debtor according to the second paragraph of section 681/1, the said section was amended by the Civil and Commercial Code Amendment Act (No. 21) B.E. 2015 and shall be enforced since the effective date of this Act, which is 15 July 2015 onwards.

**Supreme Court Judgment No. 8425/2563**

 The plaintiff is a hire purchase business operator. He made the second defendant enter into an agreement agreeing to be a joint debtor, accepting responsibility as a joint debtor for the debt of the first defendant (or higher). An agreement to be jointly liable as a joint debtor violates the law and is void according to Civil and Commercial Code Section 681/1. When considering the status of the plaintiff who is a hire purchase business operator, he knows that there has been an amendment to the suretyship law which prohibits entering into contracts that require the surety to be liable as a joint debtor. Instead of creating a suretyship contract by the law. But plaintiffs find ways to circumvent the law by relying on his superior bargaining power and being more versed in the law. To have the second defendant make a contract agreeing to be a joint debtor instead of entering into a suretyship contract. It is considered that the plaintiff did not exercise his rights in good faith. Taking into account appropriate trade standards under the fair business system according to the Consumer Procedure Act 2008, Section 12. and a joint debtor consent agreement whose purpose is contrary to public order and morals. When there is no complete part that can be separated. Therefore, the whole contract is void according to Section 150 of the Civil and Commercial Code. The plaintiff has no legitimacy to claim any rights from the agreement to be a joint debtor.

According to the Supreme Court judgment, even though the plaintiff, a hire purchase business operator, had the second defendant enter into a contract to agree to be a joint debtor instead of a suretyship contract in order to avoid the provisions of Section 681/1, which would allow the plaintiff to enforce payment of the second defendant's debt as a joint debtor, the Supreme Court considered that Section 681/1 was intended to prevent the surety from being liable as a joint debtor, in order to protect the debtor and the surety from being taken advantage of by the business operator. The plaintiff's intention was to circumvent the law. The contract to agree to be a joint debtor between the plaintiff and the second defendant is a contract whose purpose is contrary to public order and morals. Therefore, the said contract is void.

**8.2 Agreement which are divergent from the provisions aimed to protect the surety**

Section 685/1 states that

 “All agreements in relation to suretyship which are different from section 681, paragraph one, paragraph two and paragraph three, section 686, section 694, section 698 and section 699 shall be void.”

From the above provision, it can be concluded that there are five matters which cannot be agreed different from the provisions of suretyship, as follows:

The first matter concerns the validity and contents of the suretyship contract according to section 681, paragraph one, paragraph two, and paragraph three. Any agreement deviates from the said matter specified by law shall be void e.g. an agreement that requires the surety to be liable for all obligations incurred even though such obligations are not specified in the suretyship contract, an agreement that the surety must still be binding to the creditor even though the surety was not aware of a mistake of fact or an incapacity of a person at the time he entered into the contract, an agreement that gives the surety indefinite liability for the amount of money or the period of the creation of the obligation to be secured etc.

The second matter concerns the creditor’s duty to notify the surety of the debtor’s default before suing the surety according to section 686. The law imposes a duty on the creditor to provide a written notice to the surety within sixty days from the date of default by the debtor. The performance of this duty will have further effect as designated by law which is in the case where the creditor fails to issue a written notice within the period of time specified by law, the surety shall be released from the liability for payment of interest and compensation, as well as all accessory charges of such obligation incurring after the lapse of such period of time. Therefore, any agreement that differs from this provision is void e.g. an agreement that the surety must also be liable for payment of interest and compensation, as well as all accessory charges of such obligation incurring after the lapse of sixty days etc.

The third matter concerns the right of the surety to raise the debtor's or their own defense against the creditor according to section 694. Any agreement contrary to this provision is void e.g. an agreement which the surety agrees to waive their right to raise any defenses against the creditor etc.

The fourth matter concerns the release from the surety's liability when the debtor's obligations are extinguished by any cause according to section 698. Any agreement made against this provision is void e.g. an agreement in which the surety shall remain liable to the creditor even though the creditor has already released the debtor from the entire obligation.

The last matter concerns the right of the surety of a future obligation to terminate the contract for a future occasion according to section 699. The law gives the surety the right to unilaterally terminate the suretyship contract for a series of obligations and for an indefinite period of time in favour of the creditor by giving notice of such intended termination to the creditor. By this, the surety shall not be liable for the obligations incurred by the debtor.

After the notice has reached the creditor. Consequently, if there is any agreement made differently from this provision, that agreement is void e.g. an agreement in which the surety waives the right to terminate the contract under section 699, an agreement saying that the creditor must also give consent when terminating the contract for a series of obligations and for an indefinite period of time in favour of the creditor etc.

However, only the agreements differ from the sections specified in section 685/1 are void. The contract of suretyship remains valid according to the Severability Clause.[[40]](#footnote-40) These void agreements in the suretyship contract must be treated as if there were no such agreements from the beginning and the enforcement of the rights and duties between the parties must return to be as stipulated by the provisions of suretyship.[[41]](#footnote-41)

In addition, section 685/1 is a provision amended by the Civil and Commercial Code Amendment Act (No. 20) B.E. 2014, which came into effect on February 11, 2015. Therefore, the said section does not have retroactive effect to any agreement in a suretyship contract made before 11 February 2015, resulting in that agreement is still enforceable even though it violates section 685/1.

Nevertheless, since section 685/1 has been changed twice by the Civil and Commercial Code Amendment Act (No. 20) B.E. 2014 and the Civil and Commercial Code Amendment Act (No. 21) B.E. 2015, for clarification, section 8 of the Civil and Commercial Code Amendment Act (No. 21) B.E. 2015 therefore stipulates that any agreement that was made between the effective date of the Civil and Commercial Code Amendment Act (No. 20) B.E. 2014 until the day before the Civil and Commercial Code Amendment Act (No. 21) B.E. 2015 came into effect i.e. between 11 February 2015 and 14 July 2015, will continue to be enforceable as long as it is not contrary to the provisions of the Civil and Commercial Code that has been amended by the Civil and Commercial Code Amendment Act ( No. 21) B.E. 2015. As a result, although the agreements of the suretyship contract are different from the sections provided in section 685/1, if those agreements are agreed upon during the said period, such agreements are enforceable and not void in any way.

**Supreme Court Judgment No. 4308/2565**

 Certificate of payment of debt between the plaintiff and the third defendant contains the message and intent to enter into a contract which is in nature of a suretyship contract according to the Civil and Commercial Code, section 680, paragraph one. But the suretyship contract was made after the Civil and Commercial Code Amendment Act (No.20) B.E. 2014 became effective. Therefore, the amended Civil and Commercial Code, Section 681 and Section 685/1 must be used. When the obligation according to the complaint arises after making a suretyship contract, it is a suretyship for the obligation that may be valid in the future. When it is the suretyship for multiple debtors together without specifying the maximum amount guaranteed for each debtor and the time for incurring the debt to be surety, such suretyship contract is a contract of agreements different from section 681, paragraph two. It is therefore void according to section 685/1.

## **Effects Before Performance**

 Prior to the surety performing the obligation when the debtor fails to perform such obligation, the law stipulates some criteria which must be taken into account as herewith;

### **1. Creditor's alternatives when the debtor is in default**

The legal principle of "Effects before Performance in Obligation" entails a structured approach to perform obligation recovery in cases of default. Specifically, creditors possess three primary alternatives: Firstly, the creditor may initiate legal proceedings against the debtor to enforce the performance. If the debtor fails to perform the full obligation, the creditor shall demand the surety to perform the remaining obligation. Secondly, the creditor may opt to sue the surety directly for performance. If the surety fails to perform the full obligation, the creditor shall demand the debtor to perform the remaining obligation (section 685). Lastly, the creditor may sue both the debtor and the surety at the same time. This last strategy is often favored by creditors as it can save time and costs.[[42]](#footnote-42)

### **2. Surety's alternatives when the debtor is in default**

At the same time of the debtor's default on performance, the surety is presented with three alternatives for action: Firstly, the surety may opt to perform the debtor's obligation to the creditor and acquire the creditor's rights against the debtor to seek recourse against the debtor (sections 229 and 693). Secondly, the surety exercises their right to have the creditor to the debtor for performance before them, allowing the creditor to enforce the debtor's assets first (section 688-690). Lastly, the surety may exercise the right to assert their own or the debtor's defenses against the creditor (section 694).

The determination of debtor’s default relies upon compliance with the foundational principles of the provisions of obligation which specified in section 203, 204, and 206 of Civil and Commercial Code.

### **3. Liability of the Surety**

 The surety is held liable only when the fact meets the legal criteria as below mentioned;

**3.1 Initiation of the surety's liability**

Section 686, paragraph one states that

“When the debtor is in default, the creditor shall issue a written notice to the surety within sixty days from the date of default by the debtor, and, in any case, the creditor may not demand performance from the surety before the notice has reached the surety; provided, however, that the surety shall not be precluded from performing the obligation when it is due.”

The law designates the liability of a surety to begin when the debtor is in default. However, to demand performance of the obligation from the debtor, the creditor must send written notice to the surety and that notice must reach the surety already. Therefore, it can be inferred that the notice specified in this section forms the basis for the creditor to claim from the surety.[[43]](#footnote-43)

Section 686 establishes rules regarding the creditor’s notification as follows: upon the debtor's default, the creditor is required to send written notice to the surety within sixty days from the date of default. The creditor may not demand the surety to perform the obligation before the notice reaches the surety i.e. the creditor retains the authority to enforce the performance from the surety only when the surety has received such notice. Nonetheless, this provision does not impede the surety's entitlement to fulfill the obligation at its due date, meaning the surety still has the right to perform the obligation upon its due date.

**3.2 In scenarios where the creditor does not provide written notice to the surety within the specified period**

Section 686, paragraph two states that

“In the case where the creditor fails to issue a written notice within the period of time specified under paragraph one, the surety shall be released from the liability for payment of interest and compensation, as well as all accessory charges of such obligation incurring after the lapse of the period of time under paragraph one”

If the creditor fails to send written notice to the surety within sixty days from the date of default by the debtor as specified in the first paragraph of section 686, the surety shall be released from some specific liabilities according to paragraph two. This includes the payment of interest, compensation, and all accessory charges of the obligation incurring after the lapse of sixty days from the debtor's default.

However, when the creditor fails to issue the written notice to the surety within the period of time stipulated by law, it only releases the surety solely from some liabilities specifically written in paragraph two. The surety remains liable for the principal debt, interest, compensation, as well as all accessory charges of the obligation which can be calculated from the date of the debtor’s default to the date before the lapse of sixty days.

In contrast, in the case where the creditor has issued the written notice to the surety within the period of time specified by law, the creditor will not lose the right to claim interest and compensation, as well as all accessory charges of such obligation incurring after the lapse of the period of time i.e. the surety is liable for the principal debt, interest and compensation, as well as all accessory charges of the obligation which can be calculated since the date of default by the debtor to within the sixty days after that default, and also after the lapse of that sixty days.

**3.3 Surety’s options to perform obligation**

Section 686, paragraph three and four states that

“When the creditor may demand performance from the surety or the surety may perform under paragraph one, the surety may satisfy the entire obligation or satisfy the obligation in accordance with the conditions and methods of payment obligated by the debtor towards the creditor prior to the default, which may be complied with only for the part the surety is liable, and the provision of section 701, paragraph two shall apply, mutatis mutandis.

During when the surety is performing in accordance with the conditions and methods of payment of the debtor under paragraph three, the creditor may not demand additional interest on the grounds of the default of the debtor during such period.”

From paragraph three of section 686, when the creditor has the right to demand the surety to perform the obligation or the surety has the right to perform the obligation, the surety may choose to perform the obligation in any of the following ways. The first way is to perform all the debtor’s obligations. The second way is to utilize the right to perform the obligation according to the conditions and methods that the debtor has with the creditor before defaulting, but only in the part which the surety is liable for. The term “with only for the part the surety is liable” refers to scenarios involving surety who limits his liability as agreed upon, and surety who is released from the liability for payment of interest, compensation, and accessory charges under section 686 paragraph two.

That is to say the surety can choose to perform the debtor's obligation to the creditor in full or assume the debtor's right to perform the debtor's obligation to the creditor according to the conditions and methods that the creditor and debtor had agreed upon before defaulting (must consider section 691 as well). While assuming the right to perform the obligation according to the debtor's conditions and methods, the law further specifies that the creditor may not demand additional interest based on the debtor's default during that time from the surety.

However, if the surety is later in defaults to perform the obligation according to the conditions and methods the creditor has agreed with the debtor, or the surety fails to perform the obligation to the creditor according to the creditor's claim on the secured obligation, the creditor has the right to demand interest from the surety who is in default as in the position of the debtor.[[44]](#footnote-44)

**3.4 Surety’s release of liability in case where creditor does not accept the performance**

Section 701, paragraph two states that

“If the creditor refuses to accept performance, the surety shall be released from the liability.”

If the surety offers to perform the obligation to the creditor but the creditor refuses to accept that performance without any valid legal reasons, the surety is released from the liability under the second paragraph of section 701.

**Supreme Court Judgment No. 4479/2550**

 The provisions of the law regarding the placing of property to perform obligation to the creditor to release the debtor from liability, is a different matter from the surety tender performance to the creditor when the obligation is due and the creditor refuses to accept that performance, which causes the surety to be released from liability under section 701 of the Civil and Commercial Code without having to place a deposit property. When the third defendant took the cashier's check and cash in the amount notified by the plaintiff's bank employee to pay the plaintiff at the branch responsible for the disputed debt, it was a legal tender of performance to the creditor when the debt of the third defendant (surety) was due. When the plaintiff's employee who has related duties refuses to accept the performance, the third defendant is thus released from the liability according to the Civil and Commercial Code, section 701, paragraph two.

**3.5 The consistency of the surety's right of recourse**

Section 686, last paragraph states that

“Performance by the surety under this section shall not prejudice the right of the surety under section 693.”

When the surety has already performed the obligation to the creditor under section 686, the performance of the obligation by the surety will not affect the right of recourse of the surety under section 693. The surety can exercise the right of recourse or subrogate all the rights which the creditor has over the debtor.

**3.6 The non-necessity of the surety to perform the obligation before the due date**

Section 687 states that

“A surety shall not be required to effect performance prior to the time fixed for performance, even though the debtor may no longer assert the benefit of time of commencement or expiration.”

 In general, in some cases under section 193, a creditor may have the right to demand performance from the surety even though the surety's obligation is not yet due. By the benefit of time of commencement or expiration, there are four cases where the debtor cannot take advantage of the starting time or ending time according to Section 193:

|  |  |
| --- | --- |
| Case 1 | The debtor has become subject to a court’s absolute receivership order under the law on bankruptcy |
| Case 2 | The debtor fails to provide security when it is required to do so. |
| Case 3 | The debtor has destroyed or diminished any security given. |
| Case 4 | The debtor has placed as security a property of another person without the latter’s consent |

If circumstances align with any of the cases mentioned above, the creditor possesses the entitlement to demand immediate performance of the obligation from the debtor without having to wait for the debt to be due first.

However, in these cases, the law on suretyship has been specified differently from the general principle, that is even they are the cases under section 193, the surety can still assert the benefit of time of commencement or expiration i.e. the creditor cannot demand the surety to immediately perform the obligation before the debtor's obligation becomes due. The law specifies this because upon considering the reasons that stipulate not to take advantage of the beginning or ending of time, the cause of action in these cases are the debtor's own fault. Therefore, the surety, who is not at fault, should not have to endure the adverse consequences resulting from the debtor's wrongdoing as well.

In addition, in the case where the creditor and the debtor have agreed to change the time for the performance’s due date without the surety's consent, such modification entails relinquishing of the debtor's benefit of time (section 192, paragraph two). For example, the loan contract initially stipulated the performance within 1 year, but subsequently, it was changed to 8 months. The debtor's relinquishment of such benefit does not affect the surety's liability. That is to say the surety who does not give consent to waive the benefit of the time is not obliged to be bound by the newly agreed agreement on the period of time. However, the surety still has a duty to perform the obligation according to the original due date that had been agreed in the contract.[[45]](#footnote-45)

### **4. Surety’s right to exoneration**

Given that the law sees the surety solely as a secondary debtor or a second-tier debtor, when liability under the suretyship contract arises, the law therefore gives the surety the right to request the creditor to demand performance from the primary debtor or to seize the assets of the primary debtor first in certain cases. The right to exoneration of the surety appear in section 688, 689, and 690 as follows:

**4.1 Right to exoneration under section 688**

Section 688 states that

“When a creditor has demanded performance of an obligation from the surety, the surety may request that the creditor demand performance of the debtor first, unless the debtor has been adjudged bankrupt or his or her whereabouts in Thailand are unknown.”

Primarily, upon default by the debtor, the creditor possesses the entitlement to demand performance from the surety. However, the surety may exercise his or her right under section 688 by requesting the creditor to demand the debtor to perform the obligation first. Nevertheless, there are exceptions: the surety cannot exercise their rights under this section if it appears that the debtor has already been adjudicated bankrupt by the court which this shall include the case where debtors whom the court has issued a temporary receivership order too[[46]](#footnote-46) , or in the case where the debtor is not found anywhere in the Kingdom, meaning being unaware of the debtor's whereabouts in Thailand and knowing that the debtor is abroad.[[47]](#footnote-47) This is because in these two exceptions are the cases in which the creditor cannot compel performance of the obligation from the primary debtor under their pre-existing condition in any way.

Although the surety can exercise this right under section 688, the creditor has the right to whether demand performance of the obligation from the debtor first or not. The law does not stipulate the creditor to do as the surety request so (comparing to section 689 and 690).

**4.2 Right to exoneration under section 689**

Section 689 states that

“Even after the debtor has been called upon for performance as specified in the preceding section, if the surety has proven that the debtor has the means to pay his or her obligation and that the execution would not be difficult, the creditor must first execute on the property of the debtor.”

Even though section 689 designates that “Even after the debtor has been called upon for performance as specified in the preceding section”, it does not imply that it is mandatory to exercise the rights under section 688 before being able to exercise the rights under section 689. The law does not prescribe a specific sequence for exercising these rights. Therefore, the surety retains the entitlement to dispute under section 689 without necessarily invoking the right under section 688 first. Additionally, even if the surety has previously exercised the rights under section 688 and the creditor has acted upon them, the surety still maintains the right to exoneration under Section 689.

The right to exoneration under this section can be exercised by the surety in cases where the creditor has already filed a lawsuit against both the debtor and the surety within the same case. If the creditor files solely against the surety, and the surety intends to exercise their right to exoneration under this section, the surety must petition the court to issue a summons compelling the appearance of the debtor as a co-defendant in the case.[[48]](#footnote-48) By exercising such right to exoneration, the surety must prove two things: First, the debtor still has the means to perform the obligation, indicating that the debtor possesses enough assets to fulfill the obligation. However, it is not necessary for the debtor to possess sufficient assets to discharge all the obligations owed to the creditor. Even merely having the capability to perform some part of the obligation is sufficient to establish that the debtor has the means to perform the obligation. Second, the surety must demonstrate that enforcing performance from the debtor is not difficult, meaning compelling the debtor to fulfill the obligation from the assets they possess is possible and will have no difficulties. Whether it has difficulty or not necessitates case-specific assessment to consider. When the surety can prove that the above conditions are true, the law specifies that the creditor must initially seek to enforce the obligation from the debtor's property, or demand the debtor, as the primary obligor, to perform the obligation first.

**4.3 Right to exoneration under section 690**

Section 690 states that

“If the creditor retains a thing of the debtor as security, upon request by the surety, the creditor must first receive satisfaction out of such thing.”

The exercise of the surety's right to exoneration under this section is when the surety requests the creditor to demand performance of the obligation from the debtor's property held by the creditor as collateral first. The law grants the right under this section because the law sees that the surety is merely a secondary debtor who will perform the obligation to the creditor only if the primary debtor fails to do so. Therefore, when a creditor already has the debtor's property as collateral, it is prudent to demand performance of the obligation from the debtor's property first.

 For the surety to exercise the right to exoneration under this section, there must be considerations as follow:

Firstly, the property that the creditor holds as collateral for performance of the obligation must be the property of the debtor. If it belongs to a third party e.g. in the case of a mortgage or pledge, where the debtor can pledge their property to the creditor to secure their own obligation or a third party can pledge their property to the creditor to secure the debtor's obligation, in such instances, the surety will not be able to exercise their right under section 690.

 Secondly, the property of the debtor which held by the creditor must be solely for the purpose of securing the performance of the obligation. If it is held for other purposes, such as lending or accepting deposits, the surety cannot exercise its rights under this section. However, such holding does not require the creditor to possess the property as collateral. Moreover, the timing of when the creditor obtains the debtor's property held as security for the obligation is immaterial; it may occur before, during, or after the surety has entered into the suretyship contract.[[49]](#footnote-49)

Lastly, the debtor's property held by the creditor as collateral must serve as a security for the same obligation as that of the surety. This aspect is crucial because there may be multiple obligations between the creditor and debtor, and each with distinct forms of security. Therefore, even if the creditor holds the debtor's property as collateral for the performance of an obligation, if it is for securing the different obligation which the surety bound to secure, the surety will not be able to exercise their right under this section.

However, the surety has choices to whether exercise the dispute rights under section 688, 689, or 690, or even waive these rights. In accordance with this provision, if the surety performs the obligation without exercising the right to exoneration, the debtor cannot reject the surety’s right of recourse by raising the defence that the surety's performance of the obligation is without exercising the right to exoneration. This is because the surety’s right to exoneration do not serve as a defence for the debtor (must see section 694 and 695 as well).[[50]](#footnote-50) Furthermore, the surety may opt to exercise any of the right to exoneration initially, contingent upon a case-by-case circumstances.[[51]](#footnote-51)

### **5. Debt restructuring agreement**

 In practice, when it is determined that the debtor is likely to be in default on the obligation, the debtor and the creditor are likely to engage in negotiations to amend the principal debt, interest, compensation, and any accessory expenses associated with the obligation, as known this practice as “Debt restructuring contract”.[[52]](#footnote-52) Generally, the agreement to reduce the amount of obligation is enforceable solely on the contracting parties. It does not extend to the surety who is a third party. Hence, the surety cannot benefit from the debt restructuring agreement. Additionally, it is often stipulated in the debt restructuring contract that in the case when the debtor fails to perform the obligation as agreed upon for reduction, the debtor remains bound by the original obligation amount too. Consequently, the surety remains bound by the original obligation and does not derive any benefits from the obligation reduction agreement. This situation is highly inequitable for the surety.

For this reason, when there were later amendments to the Civil and Commercial Code, specifically No. 20 and 21, the law has stipulated that the surety can assume the rights of the debtor pursuant to an agreement to reduce the amount of obligation entered into between the debtor and the creditor too. Moreover, the law imposes a duty on the creditor to inform the surety of such agreements [[53]](#footnote-53) as in section 691 which states that

“In the case where the creditor has made an agreement with the debtor resulting in the reduction of the secured amount of obligation, including interest, compensation or accessory charges of such obligation, the creditor shall issue a written notice to the surety to inform him or her of such agreement within sixty days from the date of such agreement. If the debtor has satisfied the reduced obligation, or the debtor has not satisfied the reduced obligation in full but the surety has satisfied the remainder, or the debtor has not satisfied the reduced obligation but the surety has satisfied it, the surety shall be released from the suretyship. In satisfying the obligation by the surety, the surety shall be entitled to perform even though the time fixed for performance of the reduced obligation has elapsed, but not more than sixty days from the expiration of such period. In the case where the creditor has issued a written notice to the surety to inform the surety of such agreement after the lapse of the time fixed for performance of the reduced obligation, the surety shall be entitled to perform within sixty days from the date of such notice. Any agreement made after the debtor has been in default, which covers the granting of an extension of time for performance for the debtor, shall not be deemed an extension of time under section 700.

Any agreement resulting in the placement of a heavier burden on the surety than those stipulated in paragraph one shall be void.”

From Section 691, which is a provision regarding an agreement to reduce the amount of obligation that is beneficial to the surety, the first paragraph of this section may be considered in 4 separated points as follows:

**5.1 Creditor’s notification in writing to the surety of debt restructuring**

In the case where the creditor and the debtor have agreed to reduce the amount of the secured obligation, including interest, compensation, or the accessory costs associated with that obligation, the law imposes a duty on the creditor to notify the surety of the debt reduction agreement or debt restructuring agreement they have entered into with the debtor. The principle of this section is that the creditor must provide written notification of the reduction agreement to the surety within sixty days from the date the agreement with the debtor is done. However, even if the creditor fails to provide such notice to the surety within the stipulated time by this section, it does not release the surety from liability for interest, compensation, or any associated costs of the obligation. Nonetheless, the surety may be released from the suretyship according to other causes under section 691. Therefore, it could be seen that such notification is merely legal policy, and no delivery of the notice does not bring about any consequences.

**5.2 Cases which release the surety from liability**

The surety may be released from liability under section 691 if one of the following events occurs:

|  |  |
| --- | --- |
| No. 1 | The debtor has performed the obligation as agreed to reduce upon. |
| No. 2 | The debtor has not fully performed the obligation as agreed to reduce upon. However, the surety has already performed the remaining obligation. |
| No. 3 | The debtor fails to perform the obligation as agreed to reduce upon. However, the surety has already performed the obligation. |

 **5.3 The surety's right to perform the obligation**

The law grants the surety the right to perform the obligation in accordance with a debt restructuring agreement and specifies that the surety retains the right to perform the obligation even after the expiration of the due date in the debt reduction agreement. Nonetheless, such performance must be done within sixty days from the due date of performance. However, if the creditor provides written notice to the surety regarding the debt reduction agreement after the deadline stipulated in such agreement has passed, the surety retains the right to perform the performance within sixty days from the date of receiving that written notification from the creditor. In any scenario, when the surety performs the obligation according to the debt reduction agreement, the creditor is prohibited from demanding additional interest due to the debtor's default during that period of time, according to paragraph four of section 686.

**5.4 Cases where the debt restructuring agreement is made after the debtor is in default**

Section 691, paragraph one, further specifies that if an agreement to reduce the obligation is established after the debtor's default on the principal obligation, and the agreement includes an extension of the performance period for the debtor, such extension will not be regarded as a time relaxation under section 700. As a result, the surety will not be released from their liability.

It is noteworthy that from the end of section 691, paragraph one, it can be observed that agreeing to reduce the amount of obligation or entering an obligation restructuring contract can occur in two stages: before the debtor’s default or after the debtor’s default.

 Since the principle outlined in paragraph one of section 691 holds significant importance, consequently, the second paragraph further prohibits contracting parties, which mean the creditor and the surety, from entering into an agreement that would impose a heavier burden on the surety. Any agreement that increases the surety's liability beyond what is stated in the first paragraph of section 691, is void. This includes an agreement where the surety waives their right to receive benefits under a debt reduction agreement or where the surety remains liable even after the obligation has been performed according to such agreement. However, if there is an agreement that reduces the surety's burden below what is specified in this section, such as an agreement between the creditor and the debtor to reduce the amount of debt, the surety will be released from liability. Such agreement is not considered void and can be enforceable.[[54]](#footnote-54)

### **6. Interruption of prescription**

As the suretyship contract is an accessory contract whose validity depends on the principal contract. Therefore, when something happens to the principal contact and it is beneficial or harmful to the debtor in some way, it will also affect the surety in the same way. Accordingly, if the prescription of the principal obligation is interrupted and that interruption is disadvantage to the debtor, it shall disadvantage the surety as well, as specified in section 692 which states that

“An interruption of prescription against the debtor shall also operate against the surety.”

From section 193/14, the period of prescription shall be interrupted if any of the following cases occurs: Firstly, the debtor acknowledges the claim towards the creditor by written acknowledgement, part payment, the payment of interest, the provision of security or by any act which implies, without any doubt, the acknowledgement of the claim. Secondly, the creditor brings an action for the establishment of the claim or for requiring performance. Thirdly, the creditor applies for receiving a debt payment in bankruptcy. Fourth, the creditor submits the dispute to arbitration. Lastly, the creditor performs any act which is equivalent to bringing an action.

By “an interruption of prescription”, it means that the prescription that has already passed will stop and will not be counted further i.e. the time that has already passed will not be counted in prescription. Furthermore, when the cause of the interruption of the prescription expires, the prescription shall begin counting again from that time according to the prescription of that principal obligation under section 193/15.[[55]](#footnote-55) The surety must also be bound to the creditor according to the prescription that has newly begun to count.

**Supreme Court Judgment No**. **6403/2561**

The S. company (principal debtor) was sued as a bankruptcy case and the Bank N. (creditor) submitted a request for payment of the debt in a bankruptcy case, causing the interruption of prescription according to Civil and Commercial Code, section 193/14 (3). The interruption of prescription is a penalty to the S. company (debtor) and it is also a penalty to the surety according to Civil and Commercial Code, section 692. The prescription began counting from January 16, 2000 until May 30, 2012, which is the filing date over 10 years, so the suit of the plaintiff is precluded by prescription. Although on July 30, 2022, M. company (Co-surety) partially performed the obligation, causing the interruption of prescription, but Civil and Commercial Code, section 692 does not specify that if the interruption of prescription is an interruption to be a penalty to one co-surety, it will not be a penalty to the other co-surety as well. Such provisions are the legal relationship between the surety and the debtor. There is no provisions specifying mutual liability between the surety and the surety. Accordingly, the general principle must be used according to section 295 of the Civil and Commercial Code, which states that the interruption of prescription for any co-debtor is beneficial and punishable only to that debtor. Therefore, the interruption of prescription is only for the M. company. It does not affect the defendant who is a co-surety.

## **Effects After Performance**

 After the performance of the surety, such person is entitled to certain rights, which could be explained hereinafter;

### **1. Rights of recourse and subrogation**

When the debtor is in default, the creditor may demand performance from the surety and when the surety has performed the obligation whether wholly or partly, the surety shall have the right of recourse against the debtor and be subrogated to all the rights which the creditor had against the debtor as stated in section 693:

“A surety who has performed the obligation shall have the right of recourse against the debtor for the principal and interest and for any loss or damage owing to such suretyship.

The surety shall be subrogated to all the rights which the creditor has against the debtor.”

According to the above section, the rights of the surety after their performance could be classified into two rights as follows:

**1.1 Right of Recourse**

Since the liabilities of the surety are actually the liability of another person (the debtor) to the obligation, therefore when the surety has performed the obligation on behalf of the debtor, the law gives rights to the surety to recourse against the debtor for the principal obligation they have performed, which is originally the money that the debtor must pay to the creditor according to their principal obligation. Furthermore, when the principal obligation is debt which can have interest and debtor is bound to pay that interest to the creditor but the surety has paid such interest along with the principal debt already, the surety shall have the right of recourse against the debtor for as much as they have performed.

If the surety gets any loss or damage owing to such suretyship, the surety shall have the right of recourse against the debtor for such loss and damage. Damages due to suretyship e.g. when the surety does not have enough money to perform their obligation that they have to borrow money from other people and pay interest for that money 15% per year, when the creditor sues the surety and the surety has to pay for the court fees and other expenses due to litigation. In these cases, the surety shall have the right of recourse against the debtor for all the money they have paid for.

In addition, to exercise the surety’s right of recourse, if the surety has demanded performance from the debtor but the debtor refused to perform their obligation, the surety has the right to charge interest on the entire amount of money due to the debtor’s default according to section 224.

Since there is no law specifically specifying the period of prescription for exercising the surety’s right of recourse, therefore the general prescription must be applied. Under section 193/30, the period of prescription shall be ten years since the surety may enforce the rights, which is since the date the surety has performed the obligation on behalf of the debtor.

**1.2. Right of Subrogation**

When the surety fulfills the obligation on behalf of the debtor, in addition to the right of recourse outlined in paragraph one of section 693, the law also grants the surety the right of subrogation as detailed in paragraph two of section 693. The right of subrogation can be viewed as part of the right of recourse. In other words, alongside the surety's ability to seek recourse against the debtor as stated in paragraph one of section 693, if the creditor possesses any rights against the debtor that could benefit the surety, the surety may avail themselves of such benefits by invoking the creditor's rights against the debtor.[[56]](#footnote-56)

However, the subrogation of all creditor's rights against the debtor under paragraph two of section 693 still has some problems of interpretation which may be divided into two main opinions:

The first opinion is the aspect of subrogation under section 693, paragraph two is different from subrogation under section 226, as it only allows the surety to subrogate the rights of the creditor against the debtor but does not extend to the rights of the creditor over third parties.[[57]](#footnote-57) For example, Mrs. A borrowed 100,000 baht from Mrs. B and Mrs. A pledged his gold necklace to Mrs. B to keep it as collateral for the obligation. Later, Mrs. D also pledged a mortgage on land as collateral for the same obligation. Then, Mrs. C entered into a suretyship contract to be a surety of this obligation. If Mrs. C performed the obligation to Mrs. B, not only Mrs. C will have the right to seek recourse against Mrs. A, but Mrs. C will also subrogate Mrs. B's right to seize Mrs. A's gold necklace. However, according to this opinion, Mrs. C will not be able to subrogate Mrs. B's right against Mrs. D to enforce the mortgage, as Mrs. D is a third party.

The second opinion is the surety shall also subrogate the rights of the creditor over a third party.[[58]](#footnote-58) For example, Mrs. A borrowed 100,000 baht from Mrs. B and Mrs. A pledged his gold necklace to Mrs. B as collateral for the obligation. Mrs. D also registered a mortgage on the land as collateral for the same obligation. Later, Mrs. C entered into a suretyship contract to be a surety of this obligation. Therefore, if Mrs. C performed the obligation to Mrs. B. Besides having the right to seek recourse against Mrs. A, Mrs. C can also subrogate the rights of Mrs. B to forcibly pawn Mrs. A.’s gold necklace and as for this opinion, Mrs. C shall have the right to subrogate the rights of Mrs. B over Mrs. D even though Mrs. D is a third party i.e. Mrs. C can enforce Mrs. D’s mortgage on the land.

However, the surety’s subrogation of the rights of the creditor over the debtor under section 693 is not solely limited to the subrogation of the creditor’s rights in collateral for the performance, but it also includes the subrogation of any other rights that the creditor has over the debtors e.g. the right to request the enforcement of performance from a court under section 213, the right to exercise the rights in his or her own name on behalf of the debtor under section 233 etc.[[59]](#footnote-59)

### **2. Right to assert the defences**

Due to the surety being liable to perform obligation to the creditor on behalf of the debtor when the debtor fails to do so, the law gives the surety the right to assert the defences against the creditor as stated in section 694:

“In addition to the defences to which the surety is entitled against the creditor, the surety may also assert the defences to which the debtor is entitled against the creditor.”

According to the above section, there are two types of defences that the surety can raise against the creditor:

**2.1 Defences to which the surety is entitled**

The defences to which the surety is entitled against the creditor are the surety’s own defences. These defences are based on the suretyship contract between the creditor and the surety. They may arise from any general provisions regarding laws on Juristic Act and Contract or Obligation e.g. a suretyship contract was created through fraud or made under duress and is rescinded already, a suretyship contract is barred by prescription etc. they may arise from the provisions regarding Suretyship e.g. a surety contract does not have any written evidence signed by the surety, the creditor grants to the debtor an extension of time causing the surety to be released from his or her liability, the creditor refuses to accept the performance without valid reasons as stipulated by law etc.

**2.2 Defences to which the debtor is entitled**

The defences to which the debtor is entitled against the creditor are the debtor’s defences, arising from the principal contract or the contract which establishes the principal obligation e.g. the principal contract does not have any written evidence so a lawsuit cannot be filed, the principal contract void because it is not made according to the form specified by law, the principal contract was created through fraud or made under duress and the has been rescinded, the principal contract is extinguished whether wholly or partly, the principal contract is barred by prescription etc. In conclusion, if the debtor has any defence to raise against the creditor, the surety shall be able to raise that defence against the creditor as well. This is because the surety is a secondary debtor who will perform obligation to the creditor when the debtor fails to do so, therefore the law sees that the surety should not be liable more than the primary debtor.

In the past, the contracting parties often agree in a suretyship contract that the surety must waive the right to raise any defence against the creditor, whether it is the surety’s own defence or the debtor’s defence, and the Supreme Court had always ruled that such agreement can be made if it is not contrary to public order.[[60]](#footnote-60) However, in the present, an agreement in which the surety must waive their right to raise any defence against the creditor cannot be made anymore. This is because section 685/1, which was amended by the Civil and Commercial Code Amendment Act (No.21) B.E. 2015, stipulates that any agreement differs from section 694 shall be void.

**2.3 Result of not asserting defences against the creditor**

A surety who has failed to assert defences of the surety or the debtor against the creditor according to section 694 may have different legal consequences due to the types of defences as stated in Section 695:

“A surety who has failed to assert defences of the debtor against the creditor shall lose his or her right of recourse against the debtor only to the extent of the defences not asserted, unless it can be proven that he or she was ignorant of such defences and such ignorance is not the result of any fault on his or her part.”

From the section above, the law only designates the consequences in the case of a surety who does not raise the debtor’s defence against the creditor, which is the surety shall lose his or her right of recourse against the debtor only to the extent that a surety does not raise such defences i.e. the surety shall not lose their entire right of recourse. [[61]](#footnote-61) The surety may not raise defences of the debtor against the creditor intentionally or negligently.[[62]](#footnote-62) Nevertheless, there is no law explicitly stating the consequences in the case of when the surety fails to assert their own defences against the creditor. Therefore, if the surety does not raise their defence against the creditor, it does not result in losing the surety's right of recourse.

For example, Mrs. A (the debtor) borrowed 10,000 baht from Mrs. B (the creditor), with Mrs. C entering into a contract to suretyship this debt. Later, Mrs. A paid the debt to Mrs. B for 6,000 baht. After that, when the debt came due, Mrs. A defaulted on the payment, so Mrs. B called on Mrs. C to pay the debt as surety, without Mrs. C arguing that the debt had been extinguished for the amount of 6,000 baht. As such, Mrs. C lost her right to recourse from Mrs. A for the amount of 6,000 baht.

However, the principle of this section also has an exception. The surety’s right of recourse which has lost under section 695 may return to the surety if he or she can prove themselves that they do not acknowledge the defences and that ignorance is not due to the surety’s own fault. To conclude, the burden of proof in this matter shall lie with the surety.

### **3. Restriction of the recourse of the surety against the debtor who subsequently performed the obligation due to the surety’s failure of notification**

The surety’s right of recourse can be restricted according to the Civil and Commercial Code, section 696, paragraph one which states that

“A surety who has performed the obligation without notifying the debtor of such performance shall have no recourse against the debtor who, without knowledge of the fact, subsequently performed it.”

According to the above section, when a surety performed the obligation to a creditor, the surety shall notify the debtor informing them about the surety’s performance so that the surety can exercise their right of recourse against the debtor under the section 693. Even though the law does not state directly that it is the surety’s duty to notify the debtor, the law itself provides the lack in exercising the right of recourse if the surety has performed the obligation without notifying the debtor so it can be implied that the surety shall have duty of notification under this section. Therefore, if the surety has performed the obligation to the creditor without informing the debtor and the debtor, without awareness of the surety’s performance of obligation, performs the same obligation to the creditor, the surety will not have the right of recourse against the debtor later.

Section 696, last paragraph states that

“In this case, the surety may only file an action against the creditor for the return of unjust enrichment.”

However, the law provides a remedy for the surety in case he or she loses their right under paragraph one of section 696, as stated in paragraph two. The above provision allows the surety to claim back the money they have paid to the creditor by filing an action against the creditor on the basis of unjust enrichment. This is to prevent the creditor from benefiting from receiving performances for the same obligation twice.

### **4. Case of release of the surety’s liability**

In general, when a surety has performed the obligation to the creditor, the surety shall have the right of recourse and the right of subrogation under section 693. However, the creditor might perform an action, intentionally or negligently, which prevents a surety to be subrogated to the creditor’s rights, so the law specifies that the surety shall be released from the liability caused by the creditor's fault as stated in section 697:

“If, owing to any act of the creditor, the surety cannot be subrogated wholly or partly to the right, mortgage, pledge and preferential right given to the creditor prior to or at the time of entering into the contract of suretyship for the performance of the relevant obligation, then the surety shall be released from the liability only to the extent that he or she would be damaged by such act.”

From the above provision, there are three main elements which must be considered as follows:

**4.1 Impossibility of the surety’s subrogation wholly or partly to the creditor’s rights due to the creditor’s act**

Any act of the creditor which releases the surety from liability under this section may be performed intentionally or negligently. On the contrary, if it is not an act of the creditor, even though it prevents the surety from being subrogated to the creditor’s rights, the surety shall not be able to claim the right to be released from liability under this section.

**4.2 Certain rights which the surety cannot be subrogated**

The four rights mentioned in section 697 are the right, mortgage, pledge, and preferential right. These are the rights that give the creditor authority over the debtor's property which the surety cannot be subrogated to such rights.

**4.3 Period of time the right is given to the creditor**

The time at which such a right is granted to the creditor must be prior to or at the moment of entering into the contract of suretyship. If the right is granted to the creditor after the surety has entered into the suretyship contract, although the surety cannot be subrogated due to the creditor’s actions, the surety shall not be released from liability under Section 697. This is because the surety should have been aware, at the time of entering into the suretyship contract, that they could not be subrogated to the rights the creditor holds over the debtor. Consequently, when an action by the creditor preventing the surety from subrogating the rights arises after the suretyship contract has been entered into, the surety does not incur any damage.

The time which such right is given to the creditor must be prior to or at the time of entering into the contract of suretyship. If the right has be given to the creditor after the time of the surety entering into the contract of suretyship, although the surety cannot be subrogated because of the creditor’s act, the surety shall not be released from the liability under section 697. This is because the surety should have known at the time he or she entering into the suretyship contract that they cannot be subrogated to the rights which the surety has over the debtor. Consequently, when an act of the creditor which prevents the surety from subrogating the rights arise after the surety has entered into the suretyship contract, the surety therefore does not receive any damage.[[63]](#footnote-63)

If followed by these three elements, as a result, the law stipulates that the surety shall be released from the liability only to the extent that he or she would be damaged by such act, meaning that the act of the creditor which prevents the surety to be subrogated to the rights causes how much amount of damage, the surety shall be released from the liability only to the extent that he or she would be damaged by such act partly or wholly.

## **Extinction of Suretyship**

 There are five causes to the extinction of suretyship which also releases the surety from the liability as follows:

### **1. The creditor’s action which prevents the surety from subrogating the rights from the creditor**

Section 697 states that

“If, owing to any act of the creditor, the surety cannot be subrogated wholly or partly to the right, mortgage, pledge and preferential right given to the creditor prior to or at the time of entering into the contract of suretyship for the performance of the relevant obligation, then the surety shall be released from the liability only to the extent that he or she would be damaged by such act.”

According to the above provision, The right under this section must be the rights which give the creditor control over the debtor’s property, such as a pledge, mortgage, or preferential right.[[64]](#footnote-64)

However, It is noteworthy that the parties can agree to exempt Section 697 by allowing the surety to remain liable. This is because Section 697 is not a provision concerning public order or good morals and is not prohibited under Section 685/1.

**Supreme Court Judgment No. 8370/2551**

 The fact that the plaintiff released the mortgage to Mr. W may cause the third defendant, as the surety, to be unable to take over the rights from the plaintiff according to the Civil and Commercial Code, Section 693, paragraph two, which may cause the third defendant to be released from liability only to the extent of his damages according to Section 697. However, it appears that according to the suretyship contract that the third defendant made with the plaintiff, clause 5 states that “This suretyship shall bind the surety completely and forever... and the surety shall not be released from liability because the lender may do anything that causes the surety to be unable to take over all or some of the rights that were given or may have been given to the creditor before or at the time of making this suretyship contract”, which is an agreement that the contracting parties have agreed upon, except for the provisions of the Civil and Commercial Code, Section 697, which is not a law related to public order or good morals. The plaintiff and the third defendant therefore have the power to agree to have a different result. Therefore, when the plaintiff agreed to release the joint mortgage suretyship to Mr. W, even though it caused the third defendant to suffer damages, it did not release the third defendant from liability as a surety who accepted liability under the said contract.

### **2. Extinguishment of the obligation of the debtor**

Section 698 states that

“A surety shall be released from the liability when the obligation of the debtor has been extinguished by any cause.”

The extinguishment of the obligation can occur in the following cases: performance, release, set-offs, novation, and merger.

However, there is a problem whether a settlement agreement, which made between the debtor and the creditor causing the original obligation to be extinguished and establishing the new obligation according to the settlement agreement, will release the surety of the original obligation from the liability or not. As for this issue, it can be considered in two cases:

Firstly, an out-of-court settlement agreement is the case where there was an original obligation but later, the debtor and the creditor agreed to make a settlement agreement without the surety being involved. Therefore, the original obligation in this case was extinguished and a new obligation arises according to the settlement agreement. As a result, the surety is released from liability under section 698.

Secondly, a court settlement agreement is the case where the creditor filed a lawsuit in court to demand the debtor and/or the surety to perform the obligation then made a settlement agreement under section 183 of Civil Procedure Code to enforce the obligation filed by the creditor. This settlement agreement is not to extinguish the original obligation, but to force the debtor to perform such obligation with more certainty. Therefore, it does not cause the original obligation to be extinguished. The surety is still released from liability under section 698.[[65]](#footnote-65)

### **3. Termination of the suretyship for any future obligation**

 Section 699 states that

“A suretyship given for a series of obligations and for an indefinite period of time in favour of the creditor may be terminated by the surety for any future obligation by giving notice of such intended termination to the creditor.

In this case, the surety shall not be liable for the obligations incurred by the debtor after the notice has reached the creditor.”

 If the secured obligation is for a series of obligations and for an indefinite period of time e.g. suretyship for an overdraft contract with an indefinite period of time, suretyship of a person for employment with an indefinite period of time etc. The surety has the right to terminate any future obligation and the surety shall not be liable for the obligations in the future. However, if there was an obligation before the notice has reached the creditor, the surety remains liable for such obligation.

In addition, the law on Mortgages under the Civil and Commercial Code contains no provision for applying Section 699 of the law on Suretyship for enforcement. Regarding the method of termination under Section 699, the law does not specify any particular procedure. Therefore, termination can be effected verbally, regardless of whether the creditor accepts it or not. The only requirement for termination under this section is that the notice must reach the creditor.[[66]](#footnote-66)

**Supreme Court Judgment No. 1945/2537**

 A suretyship for Mrs. N.’s work which the defendant made a contract with the plaintiff is a suretyship contract given for a series of obligations and for an indefinite period of time in favor of the plaintiff. When the defendant sent a notice of termination of the suretyship contract to the plaintiff’s office. And Mrs. N., as the plaintiff’s manager, signed to accept it since September 3, 1987. It is considered that the termination of the suretyship contract is effective immediately without a resolution from the plaintiff’s board meeting to approve. Therefore, since the dates which Mrs. N. misappropriated the plaintiff's money were on September 30, 1987, and October 30, 1987, these days were after the defendant was already released from being the surety, so the defendant is not liable.

### **4. In case of the suretyship for an obligation to be performed at a definite term with the creditor’s permission of extension of time**

 Section 700 states that

“If suretyship has been given for an obligation which is to be performed at a definite time and the creditor grants to the debtor an extension of time, the surety shall be released from his or her liability, unless the surety has agreed to the extension.

An agreement concluded by the surety in advance before the creditor has granted an extension of time, which results in the giving of consent to the granting of an extension of time by the creditor shall be unenforceable.

The provision of paragraph two shall not apply to the case where the surety is a financial institution or provides suretyship for remuneration in an ordinary course of business.”

The surety shall be released from liability under section 700 with two conditions as follows:

 The first condition is that the principal obligation must have a definite time to perform the obligation. If the time to perform the obligation is indefinite, even though the creditor grants the debtor an extension of time, the surety will not be released from liability. By “a definite time”, it means the time has been specified according to the calendar or has been specified in such a way that it can be calculated according to the calendar. For example, Mrs. A borrowed 5,000 baht from Mrs. B. and the debt is due on February 10, 2025.

 The second condition is the granting of an extension of time to the debtor. The extension of time under this section must be the case where the debtor and the creditor agree to extend the time definitely. During this extension of time, the creditor will not be able to exercise their right to sue the debtor for performance, and the surety will be released from liability. However, there is an exception to this condition; if the surety also has agreed to the extension while or after, the surety shall not be released from liability.

 It is noted that if the creditor grants an extension of time to the surety without extending the time to the debtor, the surety is not released from liability.[[67]](#footnote-67)

Moreover, there is an exception to section 700 paragraph one and two as states in the last paragraph. The surety shall not be released from liability under section 700 if the surety is a financial institution or provides suretyship for remuneration in an ordinary course of business. By “financial institution”, this refers to the financial institutions under Financial Institution Business Act B.E. 2551 such as a commercial bank, a finance business and a credit foncier business. As follows, when the bank issues a bank guarantee to a customer or when the small business credit guarantee corporation provides guarantee services to small and medium-sized enterprises (SMEs), and there is an agreement in the suretyship contract consenting to grant an extension of time to the debtor in advance, such agreement is enforceable.[[68]](#footnote-68) The surety who provides suretyship for remuneration in an ordinary course of business can be a natural person or a juristic person, but they must receive remuneration in return of their entrance to the suretyship and they must perform the suretyship regularly not occasionally e.g. they become the surety as their career or do it for business.[[69]](#footnote-69)

**Supreme Court Judgment No. 521/2510**

 The defendant agreed to repay the mortgage debt for an amount of money with an agreement and time for repayment that the payment must be made within the first day of every month, 1,000 baht per month, but there is no statement that if the payment is missed in any of the installments, it will be considered as default in all installments. When the defendant fails to comply with this agreement, he is in breach of the contract. The defendant's agreement to perform the obligation in installments does not separate such obligation into different obligations. When the defendant fails to perform an obligation according to the agreed schedule, even in any of installment, he will become in default for the whole mortgage debt. It is not a default for only the installment. (General Meeting No. 9/1967)

**Supreme Court Judgment No. 2483/2516**

 The defendant is the surety of the debtor who loaned the plaintiff money. Later, the defendant entered into the Acknowledgment of Debt Agreement to pay the money to the plaintiff. The plaintiff sued for money according to the debt agreement. The defendant’s claim that the plaintiff had given the debtor an extended time to perform the obligation is not enough for the defendant to not be liable under the Acknowledgement of Debt Agreement. The defendant’s argument that the plaintiff agreed to give an extension of time to perform the obligation to the defendant, is not a matter of the creditor’s permission of extension of time. This case does not comply with section 700 of the Civil and Commercial Code, which will allow the defendant to be released from the liability. The plaintiff sued the defendant in the district court. The defendant filed a counterclaim for money of 3,850 baht from the plaintiff. The amount of money according to the counterclaim was not within the jurisdiction of the district court to accept it for consideration and adjudication according to the Constitution of the Court of Justice, sections 15, 22 (4), because the capital amount exceeded 2,000 baht, the defendant cannot file a counterclaim in an affidavit according to the Civil Procedure Code, section 177.

### **5. The creditor’s rejection to accept the performance of an obligation from the surety without any legal basis**

 Section 701 states that

“A surety may tender performance of an obligation to the creditor from the time when the obligation is due.

If the creditor refuses to accept performance, the surety shall be released from the liability.”

When an obligation is due and the surety tender performance of the obligation to the creditor legally, but the creditor refuses to accept it, the surety shall be released from liability under section 701. However, the debtor is not released from liability because the principal obligation has not been extinguished. Section 701 applies only to the surety, not the debtor. Even though the debtor has tendered performance of the obligation to the creditor, but the creditor refuses to accept it, the debtor is still not released from liability. Nevertheless, the creditor shall be in default under section 207 of Civil and Commercial Code.[[70]](#footnote-70)

**Supreme Court Judgment No. 4145/2542**

 The second defendant, who is the surety, tender to perform the obligation to the plaintiff after the plaintiff sued the first defendant, who is the over drafter, and sued the second defendant as a surety. The debt according to the overdraft contract and the suretyship contract were due since before the lawsuit was filed. Accordingly, the period of time when the second defendant offered to perform the obligation to the plaintiff is not a tendering performance of the obligation when the obligation is due under section 701, paragraph one. As a result, the second defendant is not released from liability.

## **Statute of Limitations**

 When the creditor sues both the debtor and the surety together, the statute of limitation for enforcing the suretyship must follow the principal obligation. This is because the creditor is actually enforcing the principal obligation.[[71]](#footnote-71) However, if the creditor only sues the surety, the law does not provide any specific statute of limitation for enforcing the suretyship. Therefore, the general statute of limitation shall be applied, which is 10 years from when the creditor has the right to claim.[[72]](#footnote-72)

 From section 686, paragraph one, which states that

“the creditor may not demand performance from the surety before the notice has reached the

surety.”

It means that the statute of limitation for suing the surety starts on the day which the written notice sent by the creditor arrives at the surety,[[73]](#footnote-73) not on the date of default by the debtor or on the date after the 60-day period from the date of the debtor’s default expires.[[74]](#footnote-74)

**Supreme Court Judgment No. 2208/2558**

 Exercising rights to claim or sue regarding a suretyship contract, the Civil and Commercial Code does not specify a specific prescription. Therefore, a prescription of 10 years must be used according to section 193/30. The terms of the suretyship contract state that claims under the suretyship contract must be made within 15 days from the end of the contract. It can be considered as an agreement to shorten the prescription according to section 193/11, which is contrary to the statutory provision related to public order. Therefore, it is void according to section 150.

## **Contemporary Issues**

 The contemporary concerns regarding suretyship, which involves both principal obligation and accessory obligation, are described as herewith

### **1. The application of the last paragraph of section 681 mutatis mutandis in cases where the principal obligation is voidable due to duress or fraud**

As the law allows the suretyship contract of certain voidable obligations to still be valid even after such obligation has been rescinded according to the last paragraph of section 681, which states that

“An obligation arising from a contract which does not bind the debtor because it has been entered into by mistake or owing to incapacity may be validly secured if the surety was aware of such mistake or incapacity at the time of entering into the contract.”

There is a debatable issue arising in cases where the principal obligation is voidable due to being made under duress[[75]](#footnote-75) or procured by fraud[[76]](#footnote-76) which is do such voidable obligations have the same effect on the surety's liability as when the principal obligation is voidable due to being made by the debtor’s mistake or owing to incapacity according to the last paragraph of section 681? For example, Mr. A threatens Mr. B that if he does not enter into a loan agreement with him, Mr. A will harm Mr. B. Later, this loan contract, which is caused by Mr. A, the creditor threatening Mr. B, the debtor has Mr. C come in as a surety for the debt according to the contract. What will be the effect of this suretyship contract?

On this issue, there are two types of opinions as follows:

Firstly, Seni Pramoj commented that the Civil and Commercial Code does not specifically regulate the effect on suretyship for the case where the principal obligation is voidable because of duress or fraud. Therefore, section 681, paragraph four, can be applied mutatis mutandis[[77]](#footnote-77) as follows: If the surety is aware of the duress or fraud, the suretyship contract is still valid even though the principal obligation does not bind the debtor due to duress or fraud, or that is the surety still binds himself or herself towards the creditor to perform an obligation when the debtor fails to perform such obligation.[[78]](#footnote-78)

Secondly, Chumpol Chantarathip and Panya Thanomrod believe that in cases where the principal obligation is voidable due to duress or fraud, the last paragraph of section 681 cannot be applied mutatis mutandis.[[79]](#footnote-79) This is because the juristic act which becomes voidable because of duress or fraud is fundamentally different from the juristic act which becomes voidable due to the debtor’s mistake. It is much more severe, and such act closely resembles criminal offenses. Accordingly, the law does not impose liability on the surety for such principal obligation. Consequently, if the principal obligation is voidable due to duress or fraud, it cannot be secured or guaranteed at all.[[80]](#footnote-80)

### **2. Exemption of the surety’s liability when the creditor grants to the debtor an extension of time for one of the installments**

In cases where the guaranteed principal obligation is agreed to be paid in installments, if the creditor grants an extension of time to the debtor for only one of the installments, will the surety be released from his or her liability? For instance, a creditor and a debtor enter into a loan agreement with a definite repayment on the 1st of every month for six months starting from January 1, 2567. Later, on March 1 of the same year, the debtor requests an extension of time for the fourth installment, to be due on May 1, 2567, instead, and the creditor agrees. Accordingly, will the surety in this case be released from his or her liability only for the installment in which the creditor grants an extension, or will the surety be fully released from his or her liability? In this regard, there are opinions expressed as follows:

Seni Pramoj believes that the surety is released from liability only in the installment period that the creditor grants an extension of time. As for the payment of the next installment, the surety cannot claim that the creditor has granted an extension of time because there is no granting for such installment yet.[[81]](#footnote-81)

However, Poj Putsapakhom opined that even though the creditor has only granted an extension of time to the debtor in some installments, the surety is released from all liability for the guaranteed obligation. This is because although the obligation is due to be performed in installments, it still is a single debt, not a matter of separating the debt into different obligations.[[82]](#footnote-82) When the debtor fails to pay one installment, it results in the debtor defaulting on all payments, not in default only for that period of installments. The creditor has the right to demand performance from the debtor in full. As for the creditor granting the debtor an extension of time, this is to prevent the debtor from becoming a defaulter[[83]](#footnote-83) and cause the obligation to become an obligation without definite time which damages the surety because the surety's liability is extended. Consequently, the surety is released from all liability.[[84]](#footnote-84)

### **3. Exemption of the surety’s liability when the surety tenders performance of an obligation which the debtor may perform such obligation prior its due date**

If the surety offers to perform an obligation to the creditor but the creditor refuses to accept that performance, the law provides that the surety will no longer be liable to the creditor under section 701 which states that

“If the creditor refuses to accept performance, the surety shall be released from the liability.”

The result of the creditor not accepting performance in the case where the debtor tenders performance is different from the case where the surety tenders performance. That is, if the creditor refuses to accept performance from the debtor, it only affects that the creditor cannot claim any interest during his or her default. The debtor is still not released from the liability.[[85]](#footnote-85) Meanwhile, if the creditor refuses to accept performance from the surety, it results in the surety being released from the liability.[[86]](#footnote-86)

However, there is a debating issue in the case where the debtor may tender performance before the obligation is due according to section 203, paragraph two, which states that

“If a time has been specified, in case of doubt it must be assumed that the creditor may not demand performance, but the debtor may effect it prior to that time.”

 In this case, if the surety has tendered performance to the creditor prior such obligation is due, but the creditor does not accept the performance, will the surety be released from the liability? There are two types of opinions discussed on the matter, as follows:

 Seni Pramoj suggested that the surety’s tender of performance prior to the obligation’s due date does not release the surety from the liability. However, the creditor's refusal to accept the performance from the surety results in the creditor being in default and unable to claim the default interest according to section 207, 221 and 314.[[87]](#footnote-87)

On the contrary, Pairoj Wayuparp argued that the creditor becomes the defaulter only when the debtor tenders performance. The surety is not the principal debtor, so if the surety tenders performance but the creditor refuses to accept it, the surety is thus released from the liability without considering whether the creditor is in default or not.[[88]](#footnote-88)[[89]](#footnote-89)

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2. Karnasuta, Suchada. 1999. “The Use of Intellectual Property Rights as Securities” master’s thesis, Faculty of Laws, Chulalongkorn University. [↑](#footnote-ref-2)
3. Kunkeaw, Auen. *Bankruptcy Law*. 18th ed. Bangkok: Krung Siam Publishing, 2021. [↑](#footnote-ref-3)
4. Bankruptcy Act B.E. 2483 (1940) Section 91 [↑](#footnote-ref-4)
5. Bankruptcy Act B.E. 2483 (1940) Section 94 [↑](#footnote-ref-5)
6. The purpose of a contract is the reason for concluding an agreement, which both parties to the contract commonly acknowledge. On the contrary, motivation is what drives a party to execute a contract, and such a motivation becomes the purpose for the contract when the other party also accepts it. [↑](#footnote-ref-6)
7. This term is defined in section 8 of the *Civil and Commercial Code*, which states that,

The word ‘force majeure’ shall mean any event of which the occurrence and pernicious consequences could not be prevented even though a person encountering or threatened by such event had taken such reasonable care as might be expected from a person in the position of said person and in such condition. [↑](#footnote-ref-7)
8. Pramoj, Seni. *Undergraduate Teachings on the Civil and Commercial Code, Book 3, on Insurance for Persons and Property.* Phra Nakhon: Thammasat University, 1964. p. 1 [↑](#footnote-ref-8)
9. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 21 [↑](#footnote-ref-9)
10. Section 10, Labour Protection Act B.E. 2541 amended by Labour Protection Act (No. 2) B.E. 2551 [↑](#footnote-ref-10)
11. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 209 [↑](#footnote-ref-11)
12. Section 152 of the Civil and Commercial Code [↑](#footnote-ref-12)
13. Nakseeharach, Dauenden. *Summary of Legal Principles on suretyship, mortgage, pledge, with questions and answers.* Bangkok: Winyuchon Publication House, 2021. p. 26 [↑](#footnote-ref-13)
14. Section 150 of the Civil and Commercial Code [↑](#footnote-ref-14)
15. Section 152 of the Civil and Commercial Code [↑](#footnote-ref-15)
16. Section 153 of the Civil and Commercial Code [↑](#footnote-ref-16)
17. Section 154 of the Civil and Commercial Code [↑](#footnote-ref-17)
18. Section 155 of the Civil and Commercial Code [↑](#footnote-ref-18)
19. Section 156 of the Civil and Commercial Code [↑](#footnote-ref-19)
20. Section 157 of the Civil and Commercial Code [↑](#footnote-ref-20)
21. Section 159 of the Civil and Commercial Code [↑](#footnote-ref-21)
22. Section 164 of the Civil and Commercial Code [↑](#footnote-ref-22)
23. Section 177 of the Civil and Commercial Code [↑](#footnote-ref-23)
24. Section 176 of the Civil and Commercial Code [↑](#footnote-ref-24)
25. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 27 [↑](#footnote-ref-25)
26. Section 21 of the Civil and Commercial Code [↑](#footnote-ref-26)
27. Section 29 of the Civil and Commercial Code [↑](#footnote-ref-27)
28. Section 30 of the Civil and Commercial Code [↑](#footnote-ref-28)
29. Section 34 of the Civil and Commercial Code [↑](#footnote-ref-29)
30. Section 183 of the Civil and Commercial Code [↑](#footnote-ref-30)
31. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. p. 37 [↑](#footnote-ref-31)
32. Jeeramongkolpanich, Pitikul. *Personal and Property Insurance Law on Suretyship, Mortgage, Pledge.* 4th ed. Bangkok: Winyuchon, 2009. p. 20-29 [↑](#footnote-ref-32)
33. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. p. 38-39 [↑](#footnote-ref-33)
34. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. p. 40-42 [↑](#footnote-ref-34)
35. “Interest” means the interest bearing from the money debt whether it is the interest according to contract or the interest according to law i.e. section 224 of the Civil and Commercial Code. [↑](#footnote-ref-35)
36. “Compensation” means any costs or expenses in enforcing the principal contract and the suretyship contract, and damages for any losses incurred as a result of the default [↑](#footnote-ref-36)
37. “Accessories” or accessory charges of the debt means other obligations that support the principal obligation, apart from interest and compensation. [↑](#footnote-ref-37)
38. The creditor’s right to demand performance from the debtor for the remaining obligation aligns with the general principle of the Civil and Commercial Code, section 214 which states that “Subject to the provision of section 733, the creditor shall be entitled to demand satisfaction out of the entire property of the debtor including any money and other property due to the debtor by third parties.” Accordingly, having the surety does not change the debtor's liability to the creditor. The debtor remains liable to the creditor until the obligation they have with the creditor is extinguished. [↑](#footnote-ref-38)
39. Wongwiwatwaitaya, Wiwat. *Summary of legal principles regarding loan, suretyship, pledge, mortgage.* Bangkok: Krungsiam publishing co.,ltd, 2019. p. 67 [↑](#footnote-ref-39)
40. Section 173 of Civil and Commercial Code [↑](#footnote-ref-40)
41. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. p. 49 [↑](#footnote-ref-41)
42. Chantarathip, Chumpol. *Explanation of the Civil and Commercial Code, Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon, 2015. p. 220 [↑](#footnote-ref-42)
43. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 220 [↑](#footnote-ref-43)
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46. Jeeramongkolpanich, Pitikul. *Personal and Property Insurance Law on Suretyship, Mortgage, Pledge.* 4th ed. Bangkok: Winyuchon, 2009. p. 94 [↑](#footnote-ref-46)
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49. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 42 [↑](#footnote-ref-49)
50. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p.42 [↑](#footnote-ref-50)
51. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. p. 60 [↑](#footnote-ref-51)
52. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 223 [↑](#footnote-ref-52)
53. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. 61 [↑](#footnote-ref-53)
54. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. p. 63 [↑](#footnote-ref-54)
55. Sotthibandhu Sanunkorn, *Explanation of Juristic Act-Contract*, 16th ed. Bangkok: Winyuchon Publication House, 2011. p. 266 [↑](#footnote-ref-55)
56. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 50 [↑](#footnote-ref-56)
57. Sriboonroj, Arnon*. Law on Personal and Property Suretyship, Mortgage,* *Pledge.* 7th ed. Bangkok: Winyuchon Publication House, 2020. p. 71 [↑](#footnote-ref-57)
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59. Jeeramongkolpanich, Pitikul. *Personal and Property Insurance Law on Suretyship, Mortgage, Pledge.* 4th ed. Bangkok: Winyuchon, 2009. p. 102 [↑](#footnote-ref-59)
60. Supreme Court Judgment No.15016/2551, 5413/2549, 9467/2544 [↑](#footnote-ref-60)
61. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 54 [↑](#footnote-ref-61)
62. Thiamthong, Tharnthip. *Explanation of the Civil and Commercial Code regarding suretyship, mortgage, and pledge*, 9th ed. Bangkok: Winyuchon Publication House, 2006. p. 101 [↑](#footnote-ref-62)
63. Wisarutpit, Suda. *Principles of Law on Suretyship, Mortgage, Pledge.* 11th ed. Bangkok: Winyuchon Publication House, 2015. p. 79-80 [↑](#footnote-ref-63)
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65. Jeeramongkolpanich, Pitikul. *Personal and Property Insurance Law on Suretyship, Mortgage, Pledge.* 4th ed. Bangkok: Winyuchon, 2009. p. 102-103 [↑](#footnote-ref-65)
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75. Section 164 of Civil and Commercial Code [↑](#footnote-ref-75)
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