Chapter four
suretyship

Defn- it is a K in w/c a person/guarantor/ binds himself for another person's /debtors/failure to perform his oblgn-

-mostly involves 3 party r/n ship, except the surety is the property of z debtor.

-presupposes the obligation of the principal,

-***Purpose***- facilitation /ease/ of commercial transaction/ banking loan/

-security of performance due to insolvency, unwillingness, absence

-For the guarantor- no use unless made in consideration. /Gratuitous K./

it is a k b/n surety & creditor;

- - It may be made even with out the awareness /consent/ of principal debtor/ 1921/

Qn. How the debtor is obliged to refund the creditor with out his consent?

- the obligation emanates from the law/1940/

Types of surety ship

1. Personal-the guarantor is liable to satisfy the creditor upon the debtor's failure
   - Any of his asset may be attached

Form of K

- 1725 (a)- written form
- 1727-signature of parties bound by z K
- However, the creditor is not bound to perform obligation
- It is one directional obligation, so lack of signature of creditor will not nullify the K.
- attested by witnesses
- show z maximum amount of guaranty, otherwise it will be void/ 1922(3)

2-real surety ship –surety by property

A- the debtor himself may give his property as a surety

B- A 3rd person /guarantor/ may give his property as a surety for failure of debtor.

Suretyship and other contracts

-**insurance** –in an independent k /not b/n creditor & debtor/ -bilateral k, duty to pay premium

- It is not gratuitous

whereas, suretyship is a collateral k

Warranty- is not related with failure of 3rd party/debtor/,

-It is a bilateral agreement that is given by one party for the genuine product

Liability of the guarantor

- **Interest**- unless agreed, is liable within the maximum limit /1930, 2478/
- **Cost**- shall be covered, even beyond the limit if he is notified /1931
- **Scope of surety-** can't exceed the principal debt, &can't hold more onerous terms./1924/
- eg. Penalty
- If it is onerous, it will not be nullified, it will be reduced to the p.debt./ 1924(3)
- Accessory nature of suretyship K
  - Can't exist w-out p.blgn-, discharge of p.debt releases/ extinguish/ the suretyship
  - Voidable p.oblgn- suretyship will not exist
    - Excepn- voidable due to capacity & mistake with knowledge of guarantor /1926(3)

Insolvency of p.bebtor

- Unless agreed Will not release the guarantor

- **Surety for future oblgn-**/conditional oblgn- 1925/- if the time of oblgn- is not clearly provided , he can end withdraw/ from his oblgn- b/4 the maturity of the p.debt.
- **Variation of primary debt**/ 1928/-

can't worsen the burden of guarantor. Eg. Extension of time of performance.

Sources of suretyship-

- Conventional / contract/
- Legal- emanates from the law. Eg. Seller of a property is a guarantor against dispossession- of such property
- Judicial suretyship- emanates from the decision of the court. Eg. Security against attachment, excution.

Effects of suretyship K

A. B/n creditor & surety

- Duty to discharge oblgn' of debtor in **his failure**
- when is the time of failure?

-non performance within the period b/4 maturity?

-non compliance to discharge upon demand after maturity?

-lack of asset to discharge the debt after suit/judgment?

The above issue is determined based on the type of suretyship

1.Joint guarantor/co-debtor/
1933

- Express agreement to bind the surety as joint guarantor with the p.debtor
- Upon the date of maturity the creditor can sue the guarantor with out demanding from the p.debtor

2. Simple guaranty /1934/

- Is the principle of k of guaranty
- Unless expressly agreed, the creditor can’t sue the guarantor b/4 demand from the p.debtor, i.e, demand & refusal
- The creditor is not bond to exhaust the legal action against the p.debtor

Rights of the guarantor

1- defenses against maturity of the debt /1932/ v /1868/

- until the period agreed expires, though the debt is matured due to bankruptcy.

2-benefit of discussion 1934/2/

- the right to raise a preliminary objection /as per 43, 244 of cpc/ so that the p.debtor joins the suit.
  - For the purpose of attachment of the property of the p.debor for excution/154 cpc/
  - Guarantor should indicate such properties & cover the costs of attachment
  - If the creditor fails to comply such discussion, he will lose his right in case of p.debtors bankruptcy.
  - If sufficient property is attached the suit against the guarantor will be temporarily suspended

Guarantor for one debtor in case of plurality of debtors

- In several liability debtors- the guarantor is liable only to the co-debtor to whom he is a guarantor

-Has right of discussion on the property of such debtor

- In joint & several liability debtors- is liable to failure of any debtor/ all debtors, all debt up to the amount of the guaranty
- Has right of discussion on the property of all co- debtors.

3-right to raise defenses of the p.debtor /1942/1/,/3/

- This is not only a right but also is his duty, but up on his knowledge so as to secure his indemnity

4- Acceleration of suit by guarantor

- so as to reduce the risk of non indemnity due to insolvency of the debtor

 - can summon the creditor to sue the debtor w'in 6 weeks of the maturity debt. /1938/

 non compliance of the creditor will release the guarantor

-tender payment /1939/

 -he can pay to the creditor & directly bring a suit against the debtor sooner b/4 disappearance of assets of debtor

B-b/n debtor & surety

- A guarantor’s right of indemnity is the duty of p.debtor, even w’out his awareness/consent/ of the surety ship k /1944/
- Include principal, interest, expenses, damage,
- But should notify the debtor about the suit
- Agreement to waive indemnity right is invalid /1944/

Protection of guarantor's action against the debtor

Duties of creditor-

- Hand over documents of title
- Facilitate subrogation /1946/
- In case of debtor's bankruptcy,
  - Should declare & prove the debt
  - Inform the guarantor about the bankruptcy as soon as he aware

Securities obtained from the p.debtor-

- To bring a recourse claim, the guarantor should pay the debt in advance
- Excepn- he may demand securities even b/4 payment /1948/

Lose of rights of a guarantor-

- Failure to raise defenses of p.debtor /1942/
- Failure to notify the p.debtor about the suit- but only for the costs
- 2nd payment by the p.debtor to the creditor due to failure to notify about the payment /1943/
  - He can reclaim from the creditor

Plurality of guarantors

-To spread the risk on several persons

-Is created in 3 ways

1-counter grantor /protection of guarantor/ የጠለፋ ዋስ/ 1949

-Guarantees the indemnification of the 1st guarantor who could pay to the creditor

-has no relation with the creditor

2-secondary guarantor/ successive guarantor/ 1951/2/

/French- surety ship certifier/

-guarantees performance by the 1st guarantor towards the creditor

-withrespect to him, both the p.debtor & the 1st guarantor are debtors.

-he can be indemnified from either of the two

3-plural simple/ joint/ guarantors /1951/

- Are multiple guarantors for one debtor
- Usually termed as co-guarantors

1- simple co-guarantor-

- Is the principle; i.e,
- Unless expressly given, the debt is divided b/n the co-guarantors
- But, each are 2ndary guarantor for other co-guarantor
- Has a right of discussion against the property of the other co- guarantor

2-joint co-guarantor- should be expressly given

- Each one is jointly & severally liable for the whole debt./1951/3/
- The creditor can demand payment from one of the guarantor up to the maximum limit.
- Has no benefit of discussion on the property of the other co-guarantor

3-successive co-guarantors

- The latter guarantor is liable only if the 1st guarantor fails
- Is the 2nd guarantor of the 1st one
- No defense for division of shares
- The only defense is benefit of discussion against the p.debtor & 1st guarantor

r/n ship b/n co-guarantors

- Every co-guarantor has a right of recourse against others for the share he has paid, though no agreement to such
- It emanates from the law

Criteria for the right of contribution

A-Discharge of the whole debt up to the maximum limit

- To determine the share
- To avoid similar claim by other co guarantor at other time.

B-Should be paid by a guarantor who is legally obliged to pay

- Matured debt & failure of p.debt,
- If he fails to raise the required defenses of the p.debt & other co-guarantors, he will lose his right of recourse.

C-recourse for costs-

- Incurred due to defenses common to all co-guarantors, eg. Period of limitation are recoverable
- Costs incurred due to personal defenses, eg. Capacity, negligence are not recoverable

Extinction of surety-ship- due to

1-Extinction of p.debt by- novation with out awareness of surety.

-merger, setoff, remission of the p.debt will release the surety, but the vise versa is not true.

2-nullity of p.debt-

-except voidable k due to capacity of p.debtor with awareness of surety /1926,1923/

3-period of limitation

4-substituted performance- acceptance of some property by the creditor

5-extention/delayance /of period of performance by the debtor- 1928



Closed book

Of all grounds of extinction of obligation, on which ground an obligation could revive after extinction? Why?

Closed book

- In the absence of a clear agreement or designation by law, what is the extent of the liability of each co-debtor towards the creditor.

2. A borrowed 50,000 birr from B that will be paid back until January 25/1998 E.C. For the surety of the debt A pledged his laptop to B so that it will remain in the hands of B until the debt is paid. however, B went to USA and 10 years has lapsed with out demand for the return of the money. Having seen the expiry of the right of B, A claimed for the return of the laptop. Decide the case with relevant provisions of the law & sound justification