The principle of plurality of debtors and creditors in a single contract in the civilian legal parlance referred to as the principle of solidarity obligation. In the ordinary course of events of course the more common one of the two is that of having one debtor and one creditor in contracts. All obligations presuppose a debtor creditor relationship. When we speak of plurality we are referring situations where by more than one debtors in a single contract and or more than one creditors again in a single contract instrument.

So the rules that pertain to plurality of debtors and creditors in a single contract instrument regulate the consequences that follow such arrangements. In the majority of cases the relationship is kind of two side. There is the principal relationship the debtors on the one hand and creditors on the other hand. And the other relationship is a relationship between the creditors and the debtors amongst themselves. In as far as responding to claims of the creditor in a situation where we have plurality of debtors is concerned, the debtors are considered as one. Just as single person despite the fact that their number is several. That is why it is referred to as solidarity. So there is solid relationship between the two. As far as the creditor is concerned he regards the debtors individually, collectively or in group as one person. So the creditor is always at liberty to proceed against anyone of the debtors, or against any combination or any group of the debtors or against the totality them selves. This is a general principle.

Normally bilateralism is the more common of the two. In most cases a single individual concludes a contract with another individual. Art. 1675 itself gives an indication to the possibility of having plurality of debtors or plurality of creditors in a single contract. That is why this particular art is said to be a highly loaded provision where by almost all concepts in the law of contract are to be found. Of course a contract presupposes the existence of at list two persons. One cannot conclude a contract with himself. But the definition of the term contract itself indicates that it is possible to have several or more than two persons in a single contract.

Solidarity may exist between creditors and solidarity may also exist between debtors. Solidarity is stated in different terminologies in different legal literatures. It is sometimes referred to as joint and several liabilities or joint and several rights. Joint and several liabilities assume the solidarity that exists between debtors in a single contract instrument. On the other hand joint and several rights assume a solidarity that is supposed to exists between creditors in a single contract instrument. As it is possible to have several debtors in a single contract instrument it is also possible to have several creditors.

In common law it is also not uncommon to speak of joint promisors and joint promisee. Promisors are debtors.

We can look at the problem from different scenarios. Scenario problem one is that of several debtors verses several creditors. Scenario two is several debtors verses single creditor. Scenario three is that of single debtor verses several creditors.

For example in loan contract the borrowers may be more than one. But the person granting the loan or the lender may be one. In this case for example, several borrowers borrowing money from several creditors. Second several borrowers against a single creditor. Then in the third case one person may borrow money from several creditors. In all these scenarios the primary or the principal relationship is between the debtor and the debtors on the one hand and the creditor or the creditors on the other.

The most important rational behind the principle of solidary obligation is, that of convenience of the creditor. There are several policy reasons behind the rule of protecting or giving priority to the interests of creditors as opposed to that of debtor. In the first place in a contract especially a creditor is a person who having performed his part of the obligation is requiring or expecting reciprocity from the other party. Or a creditor is a person who having demonstrated his willingness to perform his obligation is also expecting reciprocity from the other party.

One of the two important principles of the law of contract is that of security in transaction. The law should always see to it that persons who have freely consented for contractual obligations are executing or performing their contract accordingly. The social element of contract enforcement is that of the obligation of the state to ensure security in transaction. That is why the law protects the person who has performed his obligation and expecting reciprocity from the other party.

On the other hand we also have what is known as simple joint obligation. In simple joint obligation we have a single instrument where by several separate obligations have been created. The instrument may be one but the obligations may be several. In a simple joint obligation despite the fact that the instrument in which this obligations are to be found is just single one. In fact there are as many obligations in a single instrument as there are debtors or there are as many rights in a single obligation as there are creditors.

If the share of the indebtedness of every single debtor is not specified in the instrument then that obligation is a solidary or joint and several obligations. But if it is expressly stated in the instrument that each one of the debtors is only responsible to the sum specified opposite his or her name then that obligation is a simple joint obligation. So the principle of solidarity

does not apply in this case or in this first scenario. But if it is simply stated that these persons have borrowed a certain sum of money together then the rule that applies is that of the rule of solidarity. So in a simple joint obligation, there are as many contracts as there are debtors. The consequences are also different.

The rules that pertains to solidary obligations are the once that you find under Art 1896 and the followings. It says: Art. 1896. — Cases of joint and several liability. Unless otherwise agreed or provided by law, co-debtors shall be jointly and severally liable. This principle of solidarity lays the general presumption of solidarity. Unless expressly stated in a contract, a contract where there are several debtors is presumed to be one a solidary obligation. In order for a contract that has several debtors not to be solidary it has to be clearly stated in the instrument that created the obligation. This presumption can only be rebutted by an instrument showing that it is agreed by the parties that every single debtor is only liable to his share of the debt.

Art. 1897. Principle of joint and several liability. (1) The creditor may require all the debtors or one of them to discharge the obligation in whole or in part.
(2) Each debtor shall be liable until the obligation is fully discharged. This is the most important consequence of solidarity. Because, all the debtors are considered as one. it is up to the creditor to proceed against one of the debtors or against a combination of the debtors or against the totality of the debtors.

For example, in a situation where there are two debtors, “x” verses “a and b” the creditor has three options. He may proceed against “a”, or he may proceed against “b” or he may join the two and he may proceed against both of them. So if the number is two the option is three. Normally the formula is double plus one. As the complexity grows, so does the number of action available to the creditor.

We have said that the most important rational behind the rule of solidarity is that of convenience of the creditor. Because each debtor is considered as being liable to the totality of the claim of the creditor each one of the co debtors is liable to the full extent of the debt. Debtors in a joint and several liabilities cannot avail themselves of what is known as the defence of benefit of division. A debtor for example who separately proceeded against by the creditor, cannot challenge the creditor by saying that I am only liable to that share or that part of the obligation which is my share. Sometimes there are scenarios where by defendants may avail themselves of the defence of benefit of division. But that is not in this case. For example, once the claim of the creditors satisfied in the relationship between the creditors, then the rule of the defence of benefit of division holds good. It operates there. But not, in the

relationship between the creditor and the debtor. So the liability of each one of the debtor does not come to an end until such time that the creditor fully satisfied that the entire claim of the creditor is failed. This is what you see under art. 1897.

An important point to take into account is that of the concept of surety or guarantee. In a joint and several liabilities there is this rule of implied mandate or implied guarantee between the debtors. Because, each one of the debtors are bound to pay the totality of the creditors claim. It implies that there is an indirect guarantee amongst the debtors themselves. Because the principle of guarantee has that a person who guarantees a debt my be held liable. So there is this implied guarantee. Because if one of them does not pay, then the creditor can go to the other debtor and proceed against him. Although it is not expressly stated in the provision of the law, the rational understanding of rule of joint and several liabilities is deemed to have the idea of implied mandate.

Sources of solidarity

The principle of joint and several liabilities does not confine to co debtors who bind themselves in a contractual arrangement. There are other sources also. For example, co heirs, co offenders, persons bound by negotiable instruments, joint tort feathers.

The provisions following 1898 to 1905 are indications or possibilities of the operations of the doctrine of joint and several liabilities in different scenario. For example, res judicata. It is more of a concept of civil procedure. Art 5 of the civil procedure that has been litigated between two different persons considered by a court of law and decided by that court of law can not be relitigated again by those same persons in that particular court of law or even in any other legal form. So res judicata means the matter having rested. Once this process is under gone it is considered as rested by the decision of a court of law. Art. 1898. — Res judicata.

Proceedings instituted against one of the debtors shall be no bar to similar proceedings being instituted against the other debtors. If one of the debtors issued by the creditor and the decision has been rested on the case but for the reasons of inability for that creditor or the creditor cannot collect its sum, then he has the right to bring an action against the debtor. The first proceeding is no bar against the right of the creditor to proceed farther and bring an action for his claim.

The second one is that of notice. Debtors in a joint and several liabilities considered as one, notice served on one of the co-debtors is considered as having been served on all of them. If you simply serve notice on co-debtor “and” it is not necessary to serve another notice co-debtor “b”. So you may serve notice for one of the co-debtors and you may bring an action against the other co-debtor without serving a notice

on the person who is proceeded against. These are just meant to protect the interest of the creditor. The creditor is not bard by res judicata. He is not bound to serve notice on all the co-debtors.

Art. 1901. — Payment and limitation.

Any debtor may set up against the creditor defences based on the total or partial payment of the debt or on limitation. These are what are known as conventional defences. The debtors jointly or severally avail themselves the defence of limitation when they are preceded by the creditor. The English version of art. 1902 on rendition of debt, 1903 on notation and 1904 on set off is incorrect. The correct version is the Amharic one. Art. 1902. — Remission of debt.
(1) Where the debt is remitted to one debtor, all co-debtors shall be released.
(2) Notwithstanding the provisions of sub-art. (1), the creditor may specify that the debt is remitted for the exclusive advantage of one debtor.
(3) A remission under sub-art. (2) Shall not release the co-debtors unless the debt ultimately rests with the debtor for whose advantage the remission was made.

When the creditor discharges one of the co-debtors from his obligation in a contract the rule is that all the co-debtors are also considered to have been discharged. But this is the general rule. The exception is the creditor may specifically discharge one of the co-debtors from the obligation in a contract. In which case the share of the co-debtors who has benefited from the act of remition is deducted from the total. And the other co-debtors who do not benefit from this act of remition will only be liable to the debtors.

Normally there is a presumption of equality unless provided otherwise. It may also be provided otherwise in the relationship between the co-debtors that the share of each one of the co debtors is different. So if the creditor simply says that I have remitted “d”, this act of remition benefits not only that particular debtor but also the totality of the debtors. But in order for the creditor to discharge only of them he has to state in the instrument of release that he has only discharged “d” to the extent of his share. In which case the shares of this guy will be deducted from the totality of the claim.

We have said that there are two side relationships in solidary obligation. The first one is the principal relationship. It is the relationship between the debtors as one on the one hand, and that of the creditor on the other. So far we have been considering the rights or recourses available to the creditor and the extent of liability to which every single co-debtor is engaged.

The other point is that of the relationship between the debtors themselves. Once one of or some of the debtors have settled accounts with the creditor what remains is to do the house keeping exercises. Because it won't be fair one or some of the debtors to pay the totality of the claim to the creditor and for the others to be made free. So the general principle has it that the debtor or the co-debtor who has paid in excess of what he was supposed to pay had the claim been divisible or has the right to proceed against the other co-debtors for contribution. House keeping exercise has very much to do with obligation to contribute. So a debtor who has paid over and above his share of the debt has the right of recourse against the other co-debtors. This time the paying debtor becomes a creditor and those who have not paid remain debtors. The paying debtor is now subrogated or replaced to the creditor and retains the right to resort against the other once for contributions. So a debtor who is jointly and severally liable may do nothing. In as far as the relationship between the paying debtor and the other debtors is concerned; the principle of joint and several liabilities doesn't apply. That means the other co-debtors right to avail themselves of what in legal parlance is referred to as the defence of benefit of division. You divide your claim amongst as to the extent of our share of the indebtness. First of course he has to deduct his share from the indebtedness. And then as for the balance he cannot proceed against anyone of the other debtor to pay his some. He has to divide the share of the remaining debt amongst the other. And proceed against them to the extent of that share this is rule number two. Rule number three is again what would happen if again one of the remaining co debtors is unable to pay. If one of the co debtors cannot pay his share of the debt to the main debtor then that share of the debt will be divided amongst the solvent debtors and paid to the payee debtor or the first debtor.

We have said that debtors who are joint and severally liable are considered one in as far as the claim of the creditor is concerned. And until such time that the debt is fully settled every single debtor shall be bound the debt as though he ware the only or the sole debtor in the transaction... there are two sides of the co debtor or the problem. The first one is the relationship between the co debtors on the one hand and the creditor on the other. This is relationship number one. The principal relationship. The second relationship or relationship number two is that of the relationship that exists between the debtors themselves. Once one of the debtors settles accounts with the creditor or once the creditor is paid he goes out of picture and then a relationship will remain between the co debtors. And normally this has very much to do with contribution of the share of the indebtedness. A debtor who has paid over and above what he in the ordinary course of events would have been liable to the creditor has the right to subrogate himself the obligation to deduct his share of the indebtedness and for the

balance he has the right to subrogate himself to the position of the creditor and proceed against the other co debtors. As far as the relationship between the debtors themselves is concerned, one debtor is regarded as a principal debtor for his share of the indebtedness and a guarantor for the share of the other co debtors. So he deducts his share of the indebtedness then proceeds against the other co debtors.

Another point to take into account is non presence of solidarity between other co debtors in as far as contribution the debtor is concerned. Solidarity applies only in the relationship that exists between the debtors on the one hand and the creditor on the other hand. In the relationship that follows that is between debtors themselves there is no solidarity. If the debtor who has paid over and above his debt of the indebtedness proceeds against anyone of the remaining co debtors for payment of the balance then that co debtor who is proceeded against by the debtor who has paid has the right to avail himself what is known as the defence of benefit of division. You divide the share of the remaining co debtors.

The other problem is the issue of joint and several creditors. In as long as it is possible to have several debtors in a single obligation so it is possible to have several creditors in a single obligation. Of course the complexity grows as the number of co creditors increases. But there is no prohibition. If you refer to art. 1910 and the following it says, Art. 1910. — Scope of application. Unless otherwise agreed or provided by law, joint creditors shall not be jointly and severally entitled to claim payment. The distinction between this art and art. 1896 is that they are opposite. They both indicate the notion of presumption. In as far as plurality of debtors is concerned there is a presumption of solidarity. While it is not the case when creditors are several in a single obligation. In the case of plurality of debtors presumption of solidarity is the rule. Where as in the case of solidarity of creditors presumption of solidarity is the exception. For debtors to be presumed jointly and severally liable it doesn't have to be stated in the contract. Simply two or more persons have committed to perform a certain obligation in favour of another person is an indication of the fact that this person has agreed to bind themselves jointly and severally unless expressly stated otherwise in the instrument that created the obligation.

But for solidarity between creditors to exist it must be seen to it that the instrument that creates the obligation shows the existence of solidarity. And this is done of course by the agreement of the parties themselves. So for solidarity between creditors to exist the contract should indicate expressly that this right that several creditors have in the instrument is formed on the basis of a joint and several right. But once it is agreed between the parties that

solidarity of creditors is the governing relationship in the contract then other consequences follow.

If it is found out that a contract shows the existence of solidarity between creditors, and the next move is that of understanding the possible course of action that this joint and several creditors have against a debtor or a number of debtors. Normally the rule that you find under art. 1911 is, Art. 1911. — Principle. (1) Each joint creditor may require the debtor to pay the whole debt. (2) Payment made to one of the creditor shall be effective against all creditors. (3) The debtor may, at his option, pay any of the joint creditor until he is informed that proceeding hare bean instituted by one of them.
The several creditors are not required to jointly proceed against the debtor in order to be able to claim them. Anyone of them may proceed against the debtor and claim whatever he is due to the totality of creditors. This is a provision laid down to protect the debtors in the event of solidarity or solidary creditors from being subjected to multiple payments.

As far as the debtor is concerned if he pays to any one of the creditors the totality of the claim is relieved. The other creditors from being asked the debtors to pay them cannot once again go back to him and demand payment. For the purpose of their relationship with the debtor these creditors are regarded as one person. So if the debtor pays any one of the several creditors he is relieved of his obligation to effect payment to the subsequent creditors. And this protects the debtors from being liable of multiple payments.

As long as the contract shows the existence of solidarity between creditors the choice to whom to effect payment is left to the debtor. If the debtor is informed that proceedings have been instituted against any one of the creditors, then he should not effect that payment. He should refrain from effecting payment until such time that the misunderstanding between the creditors is sorted out.

In as far as the relationship between the debtors is concerned; each debtor is regarded as a principal debtor from his share of the obligation and as a guarantor for the shares of the other co debtors. Because by the operation of the doctrine of solidarity one of the co debtors settles accounts with the creditor he is in actual fact performing not only his share of obligation but the share or obligation of the other co debtors. A person who performs or pays on behalf of others is regarded as a guarantor. This is an implied guarantee. Although we don’t have an

expressed contract or agreement to guarantee by the operation of the law this relationship is regarded as a guarantor principal debtor kind of relationship.

So when we come to solidarity between the creditors because anyone of the creditors is entitled to collect the totality of the debt from the debtor, it is considered as though each creditor is regarded as a principal creditor for his share of the claim and as an agent for the share of the claim of the other co creditor is concerned. That is what we say in solidary between creditors there is the operation of what is known as implied mandate. As far as the relationship between creditors is concerned, each creditor is regarded as a principal creditor for his share and as an agent for the shares of others.

For the purpose of the relationship between the creditors and the debtor, all creditors are regarded as one person. But for the purpose of the relationship that exists between the creditors themselves each creditor is a principal creditor for his share and as an agent for the shares of others. Although you don't see an expressed authorization by each one of the creditors to authorize or to empower the other creditor to collect on his behalf, just by the operation of this doctrine the principle of implied mandate applies.

But whenever there is mistrust between the co creditors then one of the creditors may expressly go to the debtor and inform him that there is no more solidarity. So that he should not pay to the other creditors if he is proceeded against by them. In this case performance by the debtor will be to the totality of the creditors. The application of the rule of solidarity will be out of question. Sub art. 3 of 1911. Is an indirect indication of the doctrine of revocation in the law of agency. If you refer to art. 2179 and 2199 of the code, the authority to act on behalf of another stems either from the law or from an agreement. This is the general principle of law of agency. The authority to act or to enforce or to claim the right of others has its roots or its sources either from the law or from a contract. This for example is the case for the guardian or a tutor. A guardian has two capacities. In his individual capacities he may act for himself and in his capacities as a guardian or as a tutor he may act on behalf of the person for whom he is appointed as a guardian. Guardianship stems from the law. In art. 2199 for example says, Art. 2199- Definition

Agency is a contract whereby a person, the agent, agrees with other persons, the principal, to represent him and to perform on his behalf one or several legally binding acts. In as far as the agent has acted with in the scope of his power as indicated in the agency instrument he is

considered as though he has committed himself on behalf of the person who has given him that power to do so. Normally in the law of agency there may be some exceptions. But in the ordinary course of events in as much as the person has the right to appoint one as his tenant so has this person to revoke the power of agency that he has conferred to the agent. This shows that when there is misunderstanding between the joint creditors then one of the joint creditors may go to the debtor and tell him not to pay individually any more. It has to be a kind of written instrument. So this implies that the creditor doing so is considered as having revoked the implied agency that is created by the application of the doctrine of joint and several creditor ships.

The law may change but this is a universal principle. This same principle has well in the Anglo-Saxons legal tradition as it is in the civilian legal system as well. So this principle holds good everywhere.

So one, solidarity is presumed in the event of joint debtors and not presumed or should be expressed in the event of joint creditors. And the other one is in the relationship between the joint debtors one debtor is considered as a guarantor for the share of another debtor. In the relationship between the joint creditors one creditor is considered as an agent of the other creditor.

The third problem that you need to take into account is, the question what will the relationship existed between the creditors be after the debtor discharge his obligation in its entirety. If for example by the application of the operation of the rule of solidarity the debtor may pay anyone of the creditor and he goes out of the picture. The relationship now remains between the creditors themselves. In the case of joint debtors a debtor who has paid over and above his share of the obligation is regarded as a creditor for the other co debtors to claim this other co debtors to contribute what ever is due to them. But a creditor who has collected the totality of the claim from the debtor is considered as the debtor of the other co creditors. In the case of creditors the creditor who has collected the entirety of the claim is a debtor of the other co creditors as far as the shares of the claim of this other co creditors is concerned. But in the case of solidarity of debtors one who pays more than what he was actually supposed to pay is considered as the creditor of the other co debtors.

The doctrine of mandate has it that the agent has two account to the principal in as far as what he has done is concerned. This liability that the collecting creditor has against the other co

creditors stems from this general rule of accountability. In the relationship between the creditors the receiving creditor is always a debtor in as far as the share of other creditors is concerned. In the relationship between joint debtors the paying debtor is a creditor in as far as his right to claim contribution from the other co debtors is concerned. Art. 1916. —Ultimate Sharing. (1) Unless otherwise provided by the contract or by law, each joint creditor shall be entitled to an equal share of the debtor's payment. (2) A creditor receiving more than his share shall account for the excess to the other creditors. In the ordinary course of events the law presumes that the share of the claim of each creditor is equal.

Unless provided otherwise the law has it that the share of the claim of each co creditor is equal. But this is not always the case. It may be stated in the instrument that created the relationship between the creditors themselves that the share of the claim of one of the co creditors is greater than the share of the other.

There are other scenarios as well. This may be situations when there are joint debtors and single creditor. Situations where there are joint creditors and single debtor. This is the most common one of relationships. But there may be situations where there are joint debtors and joint creditors. There is also a possibility of joint debtors and several creditors' not in solidarity but in isolation simple joint obligation.

There are joint creditors and simple joint debtors. If the relationship between the creditors is not solidary but a simple joint, every one of the creditors has only one action. And the other point that we need to consider is that the debtor has the right to avail himself of the defence of benefit of division. If one of the creditors proceeds against him for the totality of the claim then this debtor should invoke the defence of benefit of division and required the creditor to bring or to limit his action only to his share of the claim. In a simple joint creditor ship the operation of the law of implied mandate does not apply. There is no agent principal kind of relationship between simple joint obligations.

Surety ship

A contract of surety ship is a secondary contract. In order for a contract of surety ship to exist, there has to be another obligation for which some other person is required to be held liable. A contract of surety ship or guarantee is regarded as personal commitment by a third person to stand for the liability of another person when that other person fails to perform his

obligation in a contract. Normally a contract has two parties that are the debtor and the creditor. But in a contract of guarantee or surety ship it is a kind of triangular arrangement. There are three parties from three different angles and two obligations. The primary obligation is the obligation that exists between the debtor and the creditor. The accessory or secondary obligation is the contract of guarantee or surety ship. Normally a surety undertakes to perform the obligation of the principal debtor should that principal debtor fails to effect payment.

As a matter of principle it is a cardinal rule that the property of the debtor is the security of the creditor. When a debtor fails to perform his obligation in a contract, the creditor resorts to the available properties of the debtor and requires attachment of such properties and execution of whatever right that he has secured on that particular property. If you for example refer to art. 1988, it says, Art. 1988. Attachment.
(1) The performance by the debtor of his obligations shall be secured by all his assets, with the exception of those which cannot be attached at law.
(2) The rules relating to attachment, and in particular to the attachment of claims vested in the debtor, are contained in the Code of Civil Procedure. It means the property of the debtor is the security of the creditor. The right of the creditor is to be enforced on the property of his debtor. In other word it means that the insolvency of the debtor is with in the risk of the creditor. If the debtor does not have property enough to satisfy the claim of the creditor, then there is nothing that the creditor can do about it. Normally when a debtor fails to perform his obligation, the first available recourse that the creditor has is towards the attached property of the debtor.

But for various reasons this rule can not be enforced. In the first place the asset of the debtor may not be good enough to satisfy the claim of the creditor in part or in whole. Point number two is that, there may be several creditors of the same debtor and the property available of that debtor may not be again good enough to satisfy the claim of the creditor. Reason number three is even if the debtor has a property enough to satisfy the claim of the creditor, for various reasons the debtor might not want to enforce or conceal the available property. He may enter into a mischievous relationship with third parties. These are what are known as improper conducts of the debtors. At times the improper conducts of the debtor might make it very difficult or even absolutely impossible for the creditor to enforce his right on the debtor’s property. So for this and similar other reasons it is advisable for any creditor

especially for the creditor who has doubt on the ability of the debtor to perform his obligation in a contract to secure or to demand additional security. And surety ship is thus one form of additional security available to a creditor.

Surety ship is a personal guarantee. It is a security device or a risk minimizing device. As we said the insolvency of the debtor is the risk of the creditor. When the creditor makes arrangement under a surety ship contract with a third person, that creditor is minimizing the risk that may be fall upon him should the debtor fail to perform his obligation. Because, he has another person to resort, when the principal debtor fails to perform his obligation.

Art. 151 and 154 of the civil procedure code have also some relevance. Generally speaking in business and economics terms surety ship is nothing but risk management device. You manage your risk by distributing it amongst several persons. If you only have one person then the risk is one hundred percent. But the more security arrangement you have made the lesser becomes the risk that you may face. So a surety is one kind of a debtor. And that is why the law refers to the parties in a surety arrangement as the creditor, the principal debtor and the guarantor or the surety.

The guarantor here of course is a secondary debtor. The liability of the guarantor comes only and only the principal debtor fails to perform his obligation in a contract. But there is exception for this. If the guarantee arrangement is kind of joint and several guarantee there is a possibility of the surety being solidaryly liable to the creditor.

There are other forms of security devices that we have under the law other than personal guarantee. Pledge and mortgage are among this other security devices. In stead of bringing a third party as a guarantor the debtor may offer his own property as collateral. For example if he takes loan from banks or if he concludes a contract to perform construction works. These are security devices what are known as guarantying a debt by offering a specific kind of property. Plague for example, relates to moveable property. But mortgage relates to business mortgage or other immoveable property. Refer to art. 2825 and 2874 for pledges. Surety ship is given to the creditor and like wise a plage is also given to a creditor. The person offering that moveable property may be a debtor himself or a third person. What matters is the undertaking to secure the debtor by offering that particular property until such time that the debtor settles account. Refer again art. 2826. The debtor himself may offer a moveable

property to the creditor as security. Or a third person on behalf of a debtor may undertake to provide plage to secure the debt of the principal debtor.

The difference between a third person who provides plage and a personal guarantor is that the liability of that third person who has offered property as collateral is limited to the extent of the value of the moveable property that he has offered to the creditor. But in case of a surety ship the surety is answerable to the creditor to the totality of the claim of the creditor if the principal debtor fails to discharge his obligation in a contract. The other difference is that a creditor who has secured his claim by way of mortgage has a priority right over that particular property on other creditors who may proceed against that same debtor. In relation to priority right refer art 2857.

A mortgage is again one form of a security device arrangement. It pertains to immoveable property. The modes of executing or enforcing this right of mortgage are similar to the modes of plage. But there are some differences especially in relation to registration. Normally a mortgage is required to be in righting. It is also required to be duly registered by the concerned body. Refer to art 3041, to 3062 for mortgage.

One important difference between mortgage and plage is that in a plage the physical possession of the property offered for plage is transferred from the plager to the plagee. In mortgage the physical possession of the property is not transferred. But it is the instrument that shows the entitlement of the mortgage or that is transferred. The creditor will remain in possession of the title deeds and relevant documents until such time the debt secured by the debtor is fully settled. So physical possession is not the rule in a contract of mortgage. But in a plage who ever gives the plage that is it may the debtor himself or it may be a third person but in both cases the creditor is required to get that plage in order to avail himself of whatever benefit that the law provides under this arrangement.

There is another way a slightly different form of security device in the civil code and this is what is known as anti crisis. Refer to art 3117 to 3130. The most important difference again between a contract of anti crisis and contract of mortgage is, in a contract of mortgage it is only the title deed and other related document that are handed over to the creditor. But in a contract of anti crisis the property it including the relating title deed is physically transferred from the debtor to the creditor. So that, the creditor remains in possession of this property until such time that the debt is fully settled. Of course the creditor also has a right to make use

of that immoveable property referred to art. 171 to 173 of the commercial code to be able to understand the situations where by a debtor or a third person offers its business to a creditor as a security device to guarantee performance of its obligations in a contract. This is more or less similar with mortgage but with slight difference.

In our civil code the expressions surety ship and guarantee are employed interchangeably. But in common law there are slight difference between surety ship and guarantee. In English law for example, surety is a person who is jointly and severally liable with the principal debtor. Where as a guarantor is a person who is secondly liable to the creditor. he is liable to the creditor only and only the principal debtor fails to perform his obligation in a contract.

In surety there are three parties in a contract. The primary obligation is the contract that we have between the debtor and the creditor. The secondary or the accessory obligation is the obligation that we have between a creditor and the surety. Once the surety pays on behalf of the principal debtor there remains the third relationship. That is the relationship between the surety and the principal debtor. Because he who pays on behalf of another has the right of indemnification any time. The surety can come back to the principal debtor so that the principal debtor indemnifies what the surety has paid to the creditor.

The distinction between insurance, warrantee and guarantee

All these arrangements are in a way risk management devices. This is their general similarity. But insurance is an independent contract. It is a contract between the insurer and the insured. For the purpose of protecting the insured when some thing happens that operates to the determent of the insured occurs. This is what is known as an insurable risk. In order for an insurance contract always there has to be an insurable interest. In a contract of insurance there is no third party. The relationship is only between the insurer and the insured. Refer to art 654 of the com. It is the risk that is insured. The risk has to be with in the insurable interest of the insured. So there is no third person involved in the arrangement. Of course the contract of insurance may be made for the benefit of the third person.

Warrantee is usually put to use in the law of sails. There is a legal warrantee and a contractual warrantee. A warrantee implies additional protection for the creditor. A warrantee may be against the dies possession of the property that the buyer has in possession of. The warrantee may relate to the conformity of the goods sold. By conformity is meant the types of goods

that are delivered to the buyer should always be similar to the once stated in the contract. Warrantee may also relate to the quality of goods this is what is known as warrantee against defect. The sailor is always required to make what ever damages good when the buyer sustains these damages on account of defective nature of the goods delivered to him. Refer to art 2221 to 2289. The other one is kind of transferring an assayable right. A right that is free from any and all encumbrances. This is kind of undertaking by the sailor to transfer an assayable right. A right that cannot be encumbered by third parties when or after the thing sold is delivered to the buyer. In a warrantee there is no third party. A warrantee is an extra protection that the law or the contract provides for the buyer. But in surety ship it is the third party that provides the extra protection for the creditor. In a warrantee it is the sailor himself that provides the protection.

Guarantee and bail bond in criminal law

In guarantee the undertaking is for civil obligation. But bail bond is to insure the appearance of the accused before either the police or before the court of law. The responsibility of the person in whose favour the bail bond is given is criminal. Whereas, the responsibility of the person giving the guarantee is civil.

Source of surety ship

The source of the primary obligation although in most cases it is contractual, this is not necessarily so. The source may be contractual or extra contractual. But the source of the surety ship obligation is always contractual.

Main features of surety ship.

In the ordinary course of events surety ship is a benefactor contract. There is no consideration due to the surety. You may stand surety for the principal debtor without his consent or even without his knowledge unless the principal debtor expressly objects to this arrangement. Art. 1921.

The second feature is surety ship is an accessory contract. By this it meant that the surety will always be liable only and only when the principal debtor fails to lives up to its expectation. A person to use the language of the common law, who promises to answer a surety, is a person who promises to answer for the debt with kind or default of another person. A surety is one

who answers not for the debt miscourage or default of himself but for that of another person. For this reason the responsibility of the surety is always subject to the failure by the principal debtor to discharge his obligation.

Another point to take note of is unless there is the primary obligation; it would be illogical to speak of an accessory obligation. So for a surety to exist the primary obligation should come first. The validity or existence or otherwise of the primary obligation determines the validity of the surety ship. So it is dependant and subject to the existence and validity of the primary obligation. And that is why we say surety ship is a subsidiary obligation. Refer to art. 1921/1 and 1926/1. Art. 1923. — Principal obligation void. (1) A guarantee may not be given except in respect of a valid obligation. Not only should the primary obligation exist, but also that primary obligation is required to be valid in order for the surety ship arrangement to be effective.

Art. 1926. — Extinction of primary debt. (1) The guarantor shall be released when the primary debt is discharged for any reason whatsoever. If the primary debtor is released for one reason or another so is the surety. And the other one has something to do with the form that a contract of surety is required to assume. As the common law says a guarantee is a person’s promise to answer for the debt miscourage or default of another person. According to art. 1725 surety ship is one of the types of contract that is required to be made in writing. So it has to be clear it has to be unequivocal and it has to be made in writing. A person who avails himself of the obligation based on the contract of surety ship is always required to produce the original document. And this in the law of evidence is what is known as the best evidence rule or the rule of parole evidence in the common law.

Art. 1922. — Form. (1) A guarantee shall not be presumed. (2) It shall be express and may not be extended beyond its contractual limits. (3) The contract of guarantee shall be of no effect unless it specifies the maximum amount for which the guarantee is given. You cannot presume surety ship. It should be proved by the best evidence.

The other important point is that the contract of surety ship should not include more burdensome terms than the primary obligation. The maximum responsibility of the surety is the maximum amount of money that the principal debtor is required to pay to the creditor. Art. 1924. — Limits of a guarantee. (1) A guarantee may not exceed the amount owed by the debtor, nor be contracted on more burdensome terms.

(2) It may be contracted in respect of part only of the debt and subject to less burdensome terms. (3) A guarantee which exceeds the amount of the debt, or which has been contracted on more burdensome terms, is not void but merely reducible to the amount of the primary debt. The prohibition is with respect to contracting with burdensome terms. If the terms are less burdensome it is possible. That means the surety is only liable to the extent of the amount of liability Specified in that agreement.

Unless provided otherwise there is no presumption of joint guarantee. So, all surety ship or guarantee is presumed to be simple guarantee. In the case of simple guarantee the general principle is that the liability of the guarantor or surety is always subject to inability to perform his obligations by the principal debtor. As long as the principal debtor is capable of performing his obligation, there is no reason why the surety should be brought to picture. This is the general rule. But it is up to the surety to avail himself of these defences and argue that first the principal debtor required to be considered prior to the creditor come to him.

Defences available for the surety

There are about five types of defences that the law provides to the surety if he is proceeded against by the creditor. The first one is what is generally known as traditional defences. These traditional defences are defences that the law provides to the principal debtor himself. So the surety who is sued by the creditor has always all the right to avail of what the law provides as traditional defences to the principal debtor.

The second one is the defence of benefit of discussion. It is a defence in which the surety may argue that the creditor proceeds against the assets or discuss the assets of the principal debtor before that creditor comes to him. This is the most important defence in the law of surety ship.

The third one is what is known as the benefit of division. The defence of the benefit of division occurs when there are several co sureties that have guaranteed the same debt.

The fourth is summons to proceed. When the debt falls due, the surety has a right to demand the creditor to proceed against the principal debtor.

The last one is tender of payment. By tender of payment it is meant situations where by the surety he tenders to perform the obligation of the principal debtor prior to that principal

debtor doing that for different reasons. Probably the principal debtor may want to protect himself from further damages that may be brought about by procrastination or unnecessary delay.

If you refer to art. 1922, 1926 and 1927, they are examples of traditional defences. Nullity of the primary obligation itself is obligation on the basis of which the principal debtor may be held liable. Statues of limitation, remission of debt and all other grounds that defendant in a contract may plead against the plaintiff or the creditor. Statues of limitation are one of the traditional defences that can be made use of by surety who is proceeded against by creditor. Normally a surety is liable on obligations only and only on which the principal debtor could be liable had the creditor brought an action against him. And only and only it is established that the principal debtor could have been liable to the claim of the creditor had that creditor brought an action against him. So if the claim is bard by limitation the principal debtor could have raised this defence and protected himself from whatever claims that the creditor may bring against him on the basis of that particular contract. So in as much the same way as the principal debtor the surety him self can invoke this defence of statutes of limitation.

The other one is the very validity of the contract itself. If the contract is especially void abenitio, the creditor does not have any right to bring an action against the principal debtor. So the surety who is sued on the basis of an invalid claim may likewise avail himself of this right. Generally the nullity of the obligation brings about the liberation of the principal debtor. And likewise the liberation of the principal debtor brings about the liberation of the surety. There may be an accepting in art. 1923.

In the case of a void able contract specially in the case of contracts that are concluded with a person having no capacity to inter into to that particular juridical act the nullity of the contract may bring about the liberation once again of the debtor who has no capacity at the time the contract was concluded. But, when it comes to the surety it is not necessarily so. Sometimes a surety might be fully aware of the circumstances the fact that the debtor did not have the required legal capacity to inter into that particular contract. So a surety, who has guaranteed a contract that is liable to the invalidation on the ground of void ability, may not avail himself of this defence. So a surety who is proved to be aware of this state of mind of the principal debtor cannot avail himself of this particular traditional defence. Art. 1923. — Principal obligation void. (1) A guarantee may not be given except in respect of a valid obligation. (2) A debt resulting from a contract which, owing to mistake or incapacity, is not binding on

the debtor, may validly be guaranteed where the guarantor, on undertaking the guarantee, was aware of the defect pertaining to the debtor which vitiated the contract. This is an exception. This is a traditional defence that can be used by the minor but not by the surety. The other important provision relating to traditional defence is art. 1926. Art. 1926. — Extinction of primary debt. (1) The guarantor shall be released when the primary debt is discharged for any reason whatsoever.
(2) The guarantor may set up against the creditor all the defences available to the debtor, and the fact that the principal debtor might have waived them cannot be set up against him. (3) The fact that the obligation of the principal debtor is null by reason of a defect in the latter's consent or of his incapacity shall not affect the guarantor, where he bound himself with roll knowledge of these circumstances. Release of the principal debtor may be brought about by performance. These defences are called traditional just because they are provided for both the principal debtor and the surety. The other four defences are only invoked by the surety.

The most common defence in the relationship between the surety and the creditor is the defence of benefit of discussion. It is a defence on the basis of which the surety may be excused. The idea is that a surety who is sued by the creditor has the right to challenge that creditor to first go and bring an action against the principal debtor prior the surety. We have generally said before that, the property of the debtor is the security of his creditor. From this general principle stems benefit of discussion. The source of this principle is the general principle of civil law which states that always the primary responsibility of debt payment rests on the debtor himself. Other persons may be held liable for the debt only he is not in a position to discharge his obligation. So what the surety does under such circumstances is to require the creditor to discuss the assets of the principal debtor prior to coming to him. By discussion of the assets of the principal debtor is meant the right to enforce once claim over the property of the principal debtor. Art. 1935. — Benefit of discussion. (1) The creditor shall not discuss the principal debtor unless the guarantor so requires as soon as he is first proceeded against. (2) The guarantor may not claim the benefit of discussion where the insolvency of the debtor has been judicially established.

The first requirement is that the surety to fulfil is to raise this defence immediately as he is proceeded against. If he is not raised immediately it is considered as he has waived. It is a kind of preliminary objection in civil procedure. There are two types of defences in civil procedure. Preliminary objection and defences on the substance of the litigation. Preliminary

defences are kind of affirmative defences that may sometimes relieve a defendant from his responsibility. When the surety raises benefit of discussion, the surety is duty bound to indicate the where about of the properties or the assets of the principal debtor. Art. 1936. Assets to be discussed.
(1) A guarantor requiring discussion shall indicate the debtor's assets to the creditor and advance sufficient money for the costs of their discussion.
(2) He may not indicate such debtor's properties as are subject to litigation, or situate outside the country of payment, or mortgaged as security for the debt but no longer in the debtor's possession. Sometimes the very act of discussion itself may entail coast. That coast will be covered by the surety. But at the end of the day the surety may claim it back from the principal debtor.

The exception is to be found under art. 1935. Art. 1935. — Benefit of discussion. (1) The creditor shall not discuss the principal debtor unless the guarantor so requires as soon as he is first proceeded against. (2) The guarantor may not claim the benefit of discussion where the insolvency of the debtor has been judicially established. The undertaking of the guarantor ensures the solvency of the principal debtor. In solvency implies the inability of one to settle account to his creditor. Only a court of law may declare insolvency just like bankruptcy. Insolvency of the principal debtor is a defence available not to the surety but to the creditor.

The third defence available to the surety is that of benefit of division. The defence of benefit of division operates in situations where there are several sureties to the same principal debtor. Art. 1951. Plurality of guarantors. (1) Where several persons became at the same time guarantors of the same debtor in respect of the same debt, each of them shall be liable as simple guarantor for his share and as secondary guarantor for the shares of the others. (2) Where the guarantors entered into their undertakings by successive acts, he who bound himself in the second place shall be held liable as secondary guarantor of the guarantor who bound himself before him.
(3) Where the guarantors expressly bound themselves as joint guarantors either with the principal debtor or as between themselves, each of them shall be answerable for the whole debt, subject to contribution from the others proportionate to their shares.

So the defence of benefit of division is a defence available to a co guarantor who is proceeded against by the creditor in disregard of the other co sureties. Then such a co surety

may demand the creditor to divide his claim. This has much to do with the doctrine of plurality of the sureties.

When we consider pluralities of sureties, they are of three varieties. The first one is co sureties who are on the same legal standing with one another. The second one is that of counter guarantor. And the third one is secondary guarantor or surety.

The defence of benefit of division operates only in the first case. If there are sureties that are guaranteed the same debt and if the creditor proceeds against anyone of these, that surety has the right to avail himself of this defence and require the creditor either too brings all the sureties to the proceeding or to divide his share. The other thing is that, if there are several sureties and some of these sureties are not in a sound economic state of performing their obligations, then only those sureties who are in a better will be required by the creditor. So there is impliedly the relationship of surety ship even amongst the co sureties them selves. Once anyone of the sureties settles account with his creditor, then the relationship of that payee surety and creditor and the other co sureties may sometimes, is kind of debtor creditor relationship.

A secondary guarantor is a guarantor who will be called by the creditor should the principal debtor and the primary guarantor is not in a position to discharge their obligation.

The other defence is summons to proceed. Once the claim has matured the surety may require the creditor to bring an action against the principal debtor. In as much as the law ends up protecting the creditor so does are protecting the interest of the guarantor. The rational is that a surety a person who is not paying his debt but he has undertaken to pay the debt of another person.

The other one is tender of payment. 1939. for various reasons the surety may tender performance.

The relationship between the surety and the debtor

In the ordinary course of events the relationship between the surety and the principal debtor ensues when the surety settles accounts. By operation of the law a surety who has paid the debt that was supposed to be paid by the principal debtor has the right to come back to the

principal debtor and require reimbursement what he has paid. This principal may assume to different forms.

One is what is known as kerographic action or direct action. Simply by virtue of settling accounts with the creditor the surety now becomes the new creditor in as far as his relationship with the creditor. If a surety has fully performed the obligation on behalf of the principal debtor the contract to a certain extent is now extinct. For this reason the surety may avail himself of all rights and privileges to a creditor who has gone out of picture. Refer to art 1940. This is the theory of indemnity. Even if the guarantee is made with or with out the knowledge of the debtor, if it is shown that the guarantor has settles accounts with the creditor by operation of the law the guarantor is entitled to require indemnity.

The benefit of subrogation

Subrogation extends not only to the personal rights. Chirographic action applies only to the personal rights that the creditor had had prior to the debt being secured by the surety. But in subrogation the right of the surety extends from those personal rights and goes to the rights that the creditor had had over the principal debtor or other guarantor. In the case of subrogation in the first place the creditor who requires payment from the guarantor is duly bound to hand over the entire document that entitled him to claim payment from the principal debtor and from other persons who have provided additional guarantees.

Subrogation is taking the entirety of the rights that the creditor had before payment. So the benefit of subrogation available to the surety is a much better protection to him than is available in a chirographic action. There may be instances where by the principal debtor may pay the creditor in situations where the surety himself has tender payment. One important obligation of the surety who pays on behalf of the principal debtor is to inform that principal debtor that he has settles accounts with the creditor.

The relationship between the sureties themselves: Co sureties are sureties several persons who have stood as guarantor of the same debt. In co sureties the guarantor can invoke benefit of division.

The other one is counter guarantor in art 1949. These counter guarantors do not have any relationship with the creditor. They are simply guaranteeing the surety the performance of the

principal debtor's obligations. But in the case of a secondary guarantor, a secondary guarantor is one who will be liable to the creditor ii the event the principal debtor and the surety fail to live up to his excexpectations in that order. So a secondary guarantor is one who will be held responsible to answer for the debt miscaurge or non payment of the principal debtor by the creditor after the former fails to live up to his expectation.

So far we are only discussing the legal consequences of surety ship when surety ship is a simple one. The legal presumption is that all surety ship is presumed to be simple. For a guarantee to be joint it has to be stated in the contract. A joint guarantor is liable jointly and severally to the claim of the creditor with the principal debtor. So the principal creditor is at liberty to precede either against the principal debtor the surety or both of them. The difference between solidary obligation and joint guarantee lies on the fact that while in the case of solidary obligations a debtor who has paid to the creditor has the right to demand contribution from the other co debtor. But it is not the case with joint guarantee.

For example, if the creditor proceeds against the principal debtor and forces the principal debtor to perform his obligation in the contract, there is no contribution as in the case of solidary obligation. Because, the ultimate responsibility of the defence is always the responsibility of the principal debtor. But unlike that of the principal debtor if it is rather the surety who is forced to pay to the creditor then that surety has the right to demand payment from the principal debtor not by way of contribution but by way of indemnity. The similarity lies in the relationship with the creditor and the difference in the relationship between themselves.

Third parties

The general principle is that, contracts only create rights and obligations as between the parties. In principle if you look at art. 1675, it provides that a contract is an obligation or an agreement made between two or more persons to create, vary or extinguish of propriety nature. art 1952 also says, except in the case of provided in this code contracts shall produce effect only as between the contracting parties. This in the law of contract is known as privity of contract. Or they are also referred to as the doctrine of relativity of contract.

Although contracts are for all practical purposes regarded as laws on the parties that are created them, the doctrine of relativity has it that it is only on those who have created them that is applicable. Third parties should neither be bound nor acquire any benefit out of it. The general principle is that contracts create rights and obligations only on those who have made

them. But when the law applies exceptionally third parties for one or another reason are drown into a contract. Third parties may be bound by the obligations created by other persons and third parties may like wise may be entitled to claim rights.

There are at least 8 exceptions where by in one or another third parties may drown into a contract. And the reasons of providing of exceptions are of practical necessity. Simply because contracts are created by the parties themselves do not necessarily imply that this right and obligation are always confined to the benefit or the liability of the parties.

Art. 1952. Relative effect of contract. (1) Except in the cases provided in this Code, contracts shall produce effects only as between the contracting parties.

(2) Nothing in this Article shall affect the provisions relating to extra contractual liability (Art. 2056). (3) Nothing in this Article shall affect the provisions relating to agency (Art. 2179-2265).

Somebody who is aware of the existence of a contract between) x (and) y (, and who concludes a contract with either of this two persons on the same subject matter and the result of which renders the performance of the first contract impossible may at times be held liable to pay damages to the party in the first contract who has sustained economic loss.

The first exception is promise for another.

One of the contracting parties has not actually concluded a contract for himself but for another. Promising that he will somehow someday will bring that third person n who at the end of the day becomes a party to the contract.

Exception number two is what is known as contract for the benefit of third party. Two persons might conclude a contract designating a third person as the benefitary thereof. Third party motor insurance is a typical example.

In legal terms the one that is liable to effect payment is known as the promisor, and the one commanding the other contracting party is known as the stipulator. The one who at the end of the day rips the benefit of stipulation is known as a third party benefitary.

The third exception is assignment of contractual rights. An assignment in general terms is an act by the creditor of transferring the whole or a portion of the right that he is entitled to get from the debtor to a third person. A typical case is a cheque.

Exception number four is subrogation. Third parties may again be brought into a contract by the doctrine of subrogation. Subrogation is a process where by a person other than the debtor pays what the creditor claims from the debtor. And replaces him on the place of the creditor to eventually claim what ever is due to him from the original debtor. So subrogation is mode of payment.

Exception number fife is delegation or performance of delegation of obligation. This is where the third party other than the debtor agrees to assume the liability of that debtor.

Exception six is what is known as transfer of rights and obligation. This in most cases appears in situations where by a business entity is transferred from one owner to another owner.

Exception number 7 is that of heirs. When one or both contracting parties die it is only natural for heirs of these contracting parties to be drowned to the arrangement.

Exception 8 has very much to do with the creditors themselves. Persons who have claims against either the creditor or the debtor on separate arrangement may in one form or another may draw into a contract.

Promise for another is again divided into two. These are Declaration of command and promise for another. The application of this exception is exectinictiong these days. The most international contract instruments have done away with it. It is either merged to other contract concepts or totally disregarded.

Art. 1953. — Option to substitute third party. At the time of the making of a contract, a party may reserve the option to substitute for himself another person assuming the rights and obligations under the contract. So “a” and “b” concluded a contract and when they conclude a contract for example, “a” may state that “although I have concluded a contract with you my intention is to bring a third party to replace me in this contract”. Art. 1954— Effect. (1) Where the appointment thus provided is made within the following three days, the contract shall be effective as if it had been entered into by representation. (2) Where the appointment is not made within three days, the contract shall be effective as between the parties who made it. This is what is known as declaration of command. The person declaring the command or the person promising to bring some other person with in a period of three days is the one who is conveyed the command of the likely new comer. But if he doesn’t come with in the period of three days the contract doesn’t come to an end. He will be bound by the contract. So the contract will remain between the parties who are originally making it.

The second form of promise for another is the situation under art. 1955 and 1956. Art. 1955. — Promise for third party. A tenet may stand promisor for a third party by omission by the said third party. In such scenario of course this person who is promising on behalf of a third party is acting as an agent. actually he doesn’t have the power or the full power to conclude this contract, the person having the power to conclude the contract is another one, or at list this contract will not be completed until this other person gives his consent, but he will try to do his best to convince this person to ratify the agreement that I have concluded with you.

The distinction between declaration of command and that of promise for third party is that, in case of declaration of command if the third party fails to approve it, the contract will remain valid between the person declaring the command as a debtor and the other party. But in the case of a promise for another, if the third party fails to ratify it the promise made by the promisor, then there is no contract. And the party whose interest is affected has the right to claim damages.

The next one is contract for the benefit of third party. Third parties who are likely to be affected by a contract who in one form or another are drawn into a contract either as receiving of the benefit or are liable to the claims of the creditors of contract are third parties. Contract for the benefit of third parties are under art. 1957 to 1961. Art. 1957. — Stipulation for benefit of third party. Parties to a contract may stipulate that one of them shall perform an obligation for the benefit of a third party.

Normally a contract entails a debtor creditor relationship. But it may be arranged in such a way that the debtor discharges his obligation not to the creditor specified in the contract but to the third person other than the creditor. This third party may be a designated third party but not necessarily. This depends on the particulars of the contract. What is important is that, the third party benefitary exists at the time the benefit of stipulation has materialised.

There are three persons in this transaction. In a contract made for the benefit of a third party, the debtor in the language of the law is referred to as the promisor. The creditor who instructs the debtor to pay the benefit of stipulation to a third person is known as the stipulator. And the beneficiary is a third party beneficiary.

Assignment of rights

Assignment is one of the means where by third parties drawn into a contract. Strictly speaking a third party is not a party to the original contract and as such he doesn’t have any right to claim anything to claim from the contract. But for various reasons this time assignment is one of the widely employed mechanism of transferring rights from one to another. So assignment is a mechanism where by a creditor transfers a right that he has to the contract to a third party who has not taken part in the formation of the contract. The subject of the transaction in assignment is what is known as a right in personum. In common law this is known as chose in action while right in rem is chose in possession. A right in personum is a right that can be claimed. But a right in possession is a right that is in actual possession. So assignment generally speaking is a mechanism where by a creditor transfers his right against the debtor in whole or in portion to a third person who was not a party to the contract between himself and the original debtor. So three persons involved in this transaction.

The creditor which after the act of assignment is referred as the assignor, and the debtor who remains a debtor until such time that he fully discharges his obligation and the new comer that is the assignee, the person in whose favour the original creditor has transferred his right.

Accordingly there are three forms of relationships that are created in this exercise. The first is the original relationship between the creditor and debtor, the second is the relationship between the assignor and assignee. If the assignment is for the entirety of the claim that the creditor has against the debtor, the new comer becomes the new creditor. If it is partial assignment the new comer becomes the new creditor to the extent of the value of property or the amount of money that is assigned.

Art. 1962. — Assignment of rights. A. creditor may assign his rights to a third party without the consent of the debtor, unless such assignment is forbidden by law or the contract, or is barred by the very nature of the transaction. The rule is for assignment. The creditor is always at liberty to asinine his right to a third party. Assignment should not be made on terms that are more burdensome to the debtor.

There are assignable and consignable rights. It could be by agreement, by law or by the nature of the right. A contract of lease could be one for prohibition by agreement. Subcontracting in a contract of construction could also be another in this type. A contract of usufruct is one. Prohibition under the law includes, partnership agreement, obligation to supply maintenance, compensation arising out of extra contractual liability etc.

Mode of assignment

Assignment can be made with or without consideration. When it is made for consideration assignment is considered as sail of right. In this case the relevant provisions of law of sail do apply. Refer to art 2266. When it is made gratuitously it would be equal to the law of donation and the relevant provisions of law of donetation art 2427 do apply.

Art. 1964. — Warranty. (1) Where the assignment is for consideration, the assignor shall guarantee the existence of the right at the time of the assignment.
(2) He shall not guarantee the solvency of the debtor, unless he expressly accepted such liability. (3) Where the assignment is gratuitous, the assignor shall not guarantee the existence of the right. The assignor should guarantee the existence of the right. If the assignor is further committed to assume the risk of insolvency of the debtor it is another arrangement. But in the relationship between the debtor and the assignee, the assignee becomes the new creditor and the debtor remains the debtor.

Art. 1966. — Valid defences. (1) The debtor may set up against the assignee, as he could have done against the assignor, any defences which were available to him upon his becoming

aware of the assignment. (2) Where he had a claim against the assignor which was net yet demandable at the time, he may invoke a set-off, provided his claim does not fall due later than the, assigned claim does.

The debtor only assumes the obligations that he was supposed to assume as against the original creditor. So he can for this reason invoke any defence against the assignee which he could have risen against the assignor. That is why art 1966 says valid defence. These are defences that the debtor could have raised against the original creditor. And like wise the debtor may also raise his own personal defences against the assignee. Another important point is that, when an assignment is made a valid assignment entitles the assignee to claim all documents or titles from the creditor.

Subrogation

Subrogation literally means substitution or replacement. In the law of obligation subrogation takes place when a third party performs the obligation of the debtor to the creditor and when the creditor goes out of the picture and the person discharging his obligation on behalf of the debtor becomes the new creditor. Subrogation may take place by the operation of the law or between the agreement of the subrogor and the subrogee. Art 1968 is for contractual subrogation while art 1971 is for legal subrogation.

The difference in assignment and subrogation lies in the fact that assignment is a sail of credit. Especially, when it is made for consideration. Subrogation is a mode of payment. The principal of subrogation is stems from the general principle of performance that we find under art 1740. So when a third party performs a contract which a debtor is duel bound to perform, this third party in most cases is entitled to replace the original creditor who after payment goes out of the picture.

Again three persons involved in this process. The debtor and creditor and the subrogate. In as far as the creditor is concerned; subrogation has the effect of extinguishing the obligation. But the obligation doesn’t fully extinguish. Because, the relationship remains between the subrogee and the original debtor. There Bing no agreement between the parties concerned, one may be entitled by the operation of the law to be subrogated to the right of another and claim payment. In most cases there are two reasons why parties may be lawfully entitled to have right of subrogation. In plain language, those who pay for others and those who are bound to pay with others. Those who are legally obliged to pay for others are entitled to replace the creditor and be subrogated. These are sureties. Those who pay with others are solidary debtors.

Delegation

In the case of assignment and subrogation the person to be replaced is a creditor. So in both cases the original creditor goes out of the picture and the new one comes to the picture. Delegation assumes a situation where by a new comer agrees to assume the obligation of the debtor where by a new comer agrees to perform the debt of the original creditor.
Again here there are three parties. The creditor who remains a creditor until he is fully paid his debt. The original debtor, who in the language of the law for this purpose is referred to as delegator and the new comer. So the arrangement is to be made between the debtor and the new comer. The agreement of the creditor is required for delegation. Because, specific performance may be required.

Art. 1977. — Acceptance by creditor. (1) Unless the contrary has been expressly stipulated, the creditor who has agreed to such a delegation shall retain his right against the original debtor. (2) He shall not demands satisfaction from the original debtor before demanding it from the delegate debtor.

Even if the creditor has agreed to the act of delegation the obligation on the part of the original debtor is not fully extinguished. The performance by the original debtor is suspended pending the due performance of by the delegate debtor. This is the rule.

Delegation may be perfect or imperfect. In the law of contract the rule is that of imperfect delegation. In an imperfect delegation the creditor always reserves the right to go back to the original debtor should the new debtor fail to discharge his obligation. The obligation of the original debtor is more or less similar to that of a surety. That is why normally delegation is referred to as imperfect.

But it may be agreed in the contract that the delegation perfect. Once the delegation is perfect the creditor relinquishes his right to go back to the original debtor should the new debtor fail to discharge his obligation. And that is the risk that the creditor assumes.

There is distinction between suspension and extinction of obligation. In the case of suspension any time the one responsible for performance fails to live up to his expectation the creditor reserves the right to go back to the creditor. But once if it is perfect delegation there is nothing that the creditor can do about going back to the original debtor. That is why in the law of delegation it is the rule for delegation to be imperfect than perfect. Perfect delegation is the exception while imperfect delegation is the rule. Exception is to be made in the

instrument that has created the delegation. And the perfection is to be made by the creditor himself. The creditor may expressly agree that he has totally released the debtor from his obligation.

Delegation in the civil law is quite different from delegation in the common law. In common law delegation is more or less similar to novation. If it is imperfect delegation the insolvency of the delegated debtor is to be assumed by the original debtor. If both are insolvent the risk is to be assumed by the creditor himself. But if it is perfect delegation the risk of insolvency of the new comer is to be assumed by the creditor. Perfect delegation has more detrimental effect on the creditor.

Art. 1980. — Rights of delegate. (1) The delegate may not set up against the creditor defences deriving either from his personal relationship with the delegator, or from the relationship between the creditor and delegator. (2) He may set up against the creditor defences deriving from his personal relationship with him.