

Connection between Period for Suretyship and Extinctive Prescription

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Abstract

Given the differences in the nature of liability between general suretyship and joint and several liability suretyship, these two forms of guaranty should be distinguished in terms of the duration of the suretyship and the commencement time of the prescriptive period for suretyship obligation. It is essential to maintain the independence of the duration of the suretyship and the prescriptive period for the liability under the suretyship. The current legal approach of directly linking these two is, however, unreasonable. The extinction of the defence of prior discussion does not necessarily represent the commencement of the prescriptive period. For general suretyship, the commencement of the prescriptive period is relatively ambiguous. The commencement of the prescriptive period can be affected by a number of factors, including the principal debtor losing the ability to perform, anticipatory breach, the creditor failing to apply for execution after obtaining a judgment, anticipatory breach by the surety, and long-term suretyship agreed upon between the creditor and the surety. These factors should be analysed on a case-by-case basis. In addition, the commencement of the prescriptive period for joint and several liability suretyship should be independent of the prescriptive period for the principal debt. Joint and several liability suretyship are fundamentally distinct from debt assumption. The impact on the commencement of the prescriptive period for suretyship obligation should also be analysed separately in cases of anticipatory breach by the principal debtor and the surety.

Keywords

Surety; General Suretyship; Joint and Several Liability Suretyship; Period for Suretyship; Extinctive Prescription.

1. Introduction

In a market economy, the establishment of a suretyship system has generated fresh opportunities and momentum for the advancement of individuals and enterprises. By aiding creditors in mitigating and averting credit risks, it facilitates transactions. However, in the practical implementation of a suretyship system, the relationship between the duration of suretyship and the prescriptive period for suretyship obligation has given rise to a series of complex challenges and disputes, encompassing both periods' essence, their computation methodologies, their interconnection, and the application of legal principles in specific scenarios. Consequently, ascertaining the liability of the surety entails a complex process.

The setting of time limits or durations for exercising rights in civil law is primarily aimed at stabilizing civil legal relationships. The preclusive period and the prescriptive period are two core systems concerning periods of time in civil law. As a statutory duration of the existence of rights, once the preemption expires, the related rights automatically lapse. The period can be set either by mutual agreement of the parties or directly by law.

In theory and practice, there has always been debate over the legal nature of the period for suretyship. Chinese scholars hold different views on this issue, with three main perspectives: the period for suretyship as an preclusive period, as a prescriptive period, and as a "special period." Before the implementation of the Civil Code of the People's Republic of China(hereinafter referred to as the Civil Code), scholars during the period of The Guarantee Law of the People's Republic of China generally agreed with the preclusive period theory. After the implementation of the Civil Code, the Supreme People's Court's attitude towards the nature of the period for suretyship has undergone significant changes. However, there is still no theoretical consensus, and it is identified as a "special period for exercising rights."

In recent years, the promulgation of the Civil Code has once again sparked in-depth discussions on the suretyship system. Theoretically, scholars have explored the nature and definition of the period for suretyship and have clearly defined the relationship between the period for suretyship and the prescriptive period under the new legal context. The provisions of China's suretyship system are relatively complex, and the period for suretyship and the extinctive prescription for the suretyship obligation show intricate cross-influences in aspects such as commencement, suspension, and interruption. In some judicial cases, parties and courts have unclear understandings of the relationship between the period for suretyship and the prescriptive period, often confusing the two.

Therefore, clearly understanding the relationship between the extinctive prescription for the suretyship obligation and the period for suretyship, flexibly handling the boundaries between the period for suretyship and the prescriptive period in practice, and appropriately adjusting and supplementing existing provisions in specific situations are essential. This not only clarifies the connection between the two and provides a solid foundation for practical operation but also meets the needs of social development and the goal of protecting the legitimate rights and interests of the parties.

This article aims to explore the issues related to the coexistence and connection of the period for suretyship and the extinctive prescription for the suretyship obligation in the Civil Code. It reviews the time relationship between the period for suretyship and the extinctive prescription for the suretyship obligation, thereby providing theoretical support for the further improvement of China's suretyship system.

2. Coexistence and Coordination of the Period for Suretyship and the Extinctive Prescription

Regarding the relationship between the period for suretyship and the extinctive prescription for the suretyship obligation, there are differing views in the academic community on whether the two can coexist. Some scholars advocate that the period for suretyship and the extinctive prescription for the suretyship obligation cannot exist simultaneously, i.e., they support the incompatibility theory. However, some other scholars are in favor of compatibility, that the two can coexist, each play a role in restricting the creditor's exercise of his right, but at different times. The prevailing view is that the two can coexist. The current legal system provides that the starting point of the prescriptive period for general suretyship obligations is the date of the extinction of the surety's right to refuse to assume suretyship liability, i.e., the date of the extinction of beneficium excussionis. However, there is controversy over whether this provision is reasonable. There are also different views in the legal profession as to whether the prescriptive period for contracts of suretyship applies to the ordinary prescriptive period or whether a special starting point should be established for contracts of suretyship. Against this backdrop, the author will discuss the coexistence and convergence of the period for suretyship and the prescriptive period from the perspective of the protection of the surety's interests and the reasonableness of the legal provisions.

2.1. Coexistence of the Period for Suretyship and the Extinctive Prescription for the Suretyship Obligation

The question of whether the period for suretyship and the extinctive prescription for the suretyship obligation can coexist has been a focus of academic attention since the time of the Guarantee Law to the time of the Civil Code. One of the doctrines is the doctrine of incompatibility, which is reflected in Article 25 of the Guarantee Law of the People's Republic of China (hereinafter referred to as the Guarantee Law), i.e., when the creditor asserts its rights judicially within the period for suretyship, the period for suretyship is interrupted, in the same way as the prescriptive period is interrupted. However, paragraph 1 of Article 34 of Judicial Interpretation of the Supreme People's Court on Some Issues Regarding the Application of the Guarantee Law of the People's Republic of China (hereinafter referred to as the "Judicial Interpretation of the Guarantee Law") promulgated at the same time has clearly stipulated the specific requirements for the commencement of the prescriptive period for general suretyship obligations, i.e., the prescriptive period shall commence to run from the date when "the judgment or ruling of the principal debt comes into effect", which conflicts with Article 25 of the Guarantee Law. This means that after the creditor fails to enforce the effective judgment, the extinctive prescription for the suretyship obligation starts simultaneously with the recalculation of the period for suretyship [1]. This causes confusion in calculating the period for suretyship and the extinctive prescription, leading courts in practice to avoid applying this provision, denying the interruption of the period for suretyship [2]. In addition, based on the same claim in the same legal relationship to produce two time period system is unreasonable, and these two period for the surety and the creditor are not the same legal consequences, or even there is a huge difference [3]. Therefore, the above viewpoint advocates that the prescriptive period and the period for suretyship shall not coexist, and only one of them can be applied[4].

Another viewpoint is the compatibility theory or coordination theory. With regard to the prescriptive period of the contract of suretyship and the period for suretyship, this view emphasizes that although they are different in nature, they can be used concurrently to protect the surety's interests. The two periods have different focuses in their functions but do not exclude each other and are complementary. Specifically, the period for suretyship is mainly used to limits the time within which the creditor can claim rights against the surety, while the contract of suretyship of limitation focuses on limiting the period within which the creditor can exercise their rights after claiming against the surety. Thus, Thus, the two periods operate consecutively in time, and work together to limit the creditor's exercise of suretyship right [5]. According to Article 692 of the Civil Code, under the current system, the period for suretyship is a fixed period that cannot be suspended, interrupted or extended, and the period for suretyship coexists with the prescriptive period for the suretyship obligation. The author believes that compared with the Guarantee Law period, the existing system is more reasonable, the period for suretyship is no longer involved in the problem of recalculation. Instead, after the creditor claims rights, the period for suretyship extinguishes, correcting the interference between the the period for suretyship and the prescriptive period in the original system and ensuring their independence. At the same time, the suspension, interruption and extension of the extinctive prescription for the suretyship obligation have solved the problem of creditor protection by providing creditors with a legal path to sue the surety in the event of unsuccessful execution against the debtor.

2.2. Connection of the Period for Suretyship and the Extinctive Prescription for the Suretyship Obligation

Article 34 of the Judicial Interpretation of the Guarantee Law provides that the prescriptive period for a general suretyship obligation commences to run " the date when the judgment or

arbitration award becomes effective". Most scholars are critical of this provision, first, because it does not mention the situation where the creditor simultaneously sues the surety, . Secondly, it allows the prescriptive period to run when the creditor has not yet asserted its liability to the surety, and fails to take into account the surety's interest subject to the period for suretyship.

Article 694, paragraph 1, of the Civil Code amends the provisions of previous judicial interpretations by establishing a prescriptive period for general suretyship obligations from the date of extinction of the surety's right to refuse to assume the suretyship liability. The current system distinguishes between the "the date the legal document becomes effective" and the "time when execution against the principal debtor is unsuccessful", but adopts the "inter-conversion" approach between the period for suretyship and the prescriptive period. Some scholars advocate that, in the general suretyship, the creditor's "knowledge or should have known" of the impairment of their right should be interpreted as "the prescriptive period of the suretyship obligation shall automatically start to run when the surety's right of defense against lawsuits is extinguished and the surety fails to actively undertake the suretyship liability. " [6] However, academics are still skeptical about the reasonableness of this article.

First, the right to refuse to assume the surety's liability, i.e. the *beneficium excussionis*, must be exercised by the holder of the right; the surety enjoys the *beneficium excussionis* but has not exercised the *beneficium excussionis* cannot prevent the creditor from claiming the right to the surety and will not affect the calculation of the limitation period. Therefore, *beneficium excussionis* cannot ipso facto prevent the creditor of the surety from claiming the liability of the surety. This provision does not take into account practical difficulties in exercising the right, such as force majeure or impossibility of performance, nor does it take into account other initial conditions, such as art. 687, para. 2, concerning the creditor's attachment of the debtor's property. The *beneficium excussionis* is extinguished only if the execution is unsuccessful, otherwise the limitation period for the suretyship obligation does not start to run. Thirdly, in the case of an general suretyship, the creditor does not need to make a demand on the surety for the prescriptive period to commence automatically. However, under joint and several suretyship, when the principal debtor is unable to repay the debt, Article 693, Paragraph 2 of the Civil Code still requires the creditor to actively and explicitly demand that the surety assume suretyship responsibility for the prescriptive period of the suretyship obligation to commence. Without this demand, it is impossible to determine if the suretyship claim has been damaged. Therefore, the current provisions of the prescriptive period will be contrary to the general principle of suretyship liability, so that the ordinary surety needs to bear a heavier obligation than the joint and several surety. In conclusion, although the obligation of a surety is ancillary in nature, it is still unreasonable in many respects to link the expiry of the period of the suretyship with the commencement of the prescriptive period of the suretyship.

2.3. Whether the Ordinary Prescriptive Period Applies to the Prescriptive Period for Contracts of Suretyship

The question of whether the ordinary prescriptive period applies to the prescriptive period for contracts of suretyship has been a hot topic of academic discussion. According to Article 188 Paragraph 2 of the Civil Code, in general, the prescriptive period for the principal debt shall be calculated from the date when the right holder knows or should have known of the damage to his rights and interests. Therefore, the special commencement point set for the prescriptive period of suretyship contracts in Article 694, Paragraph 1 of the Civil Code raises questions: Does this provision mean that, based on the principle of "special laws take precedence over general laws," Article 188 no longer applies to suretyship contracts? Is there a necessity for setting this special commencement point?

Scholars generally believe that Article 694 should be interpreted as a supplementary provision under the premise of following the general commencement standards of the prescriptive period.

First, the expiration of the period of the contract of suretyship and the extinction of beneficium excussionis is not a sufficient condition for the commencement of the prescriptive period, but only a necessary condition for the commencement. The creditor must fully prove that the suretyship claim has been objectively damaged and that the creditor knew or should have known that their suretyship claim was damaged [7], such as the expiration of a grace period granted by the creditor or the principal debtor's failure or refusal to perform the debt when due. Secondly, there is no need to establish a separate special prescriptive period for suretyship obligation, as the suretyship obligation arising from the suretyship contract with the creditor is a contractual debt. Therefore, the rules of the ordinary prescriptive period system concerning the interruption, suspension and extension of the prescriptive period shall apply. [8].

Regarding the provision of Article 694, paragraph 1 of the Civil Code, should it be regarded as a case of "otherwise prescribed by any law" in Article 188 of the Civil Code? From the legislative intent and the content of the provision, the author is of the opinion that when the surety fails to assume suretyship liability even after the extinction of beneficium excussionis, resulting in the creditor's right being damaged, it is in line with the situation of the commencement of the prescriptive period stipulated in the law. At this point, the time of damage is clear, and the general rules for the commencement of the prescriptive period should apply, rather than treating it as a "special provision" where "laws provide otherwise. [9]" According to the nature of the contract of suretyship, the ordinary prescriptive period and article 694 set the same idea, the legislator refers to the prescriptive period of the contract of suretyship is conducive to clarity and judgment of the starting point of the contract of suretyship. At the same time, in terms of the legal system, the setting of special commencement point could undermine the generality of legal provisions and the uniformity and standardization of the legal system. so the author believes that there is no need to set up a separate starting point for the prescriptive period for contracts of suretyship.

3. Commencement of the Extinctive Prescription for the General suretyship

In conjunction with articles 188 and 694 of the Civil Code, the elements for the commencement of the extinctive prescription for the suretyship obligation include the following: the creditor's right on suretyship has been infringed, the creditor knew or should have known of the infringement of the creditor's right on suretyship, and the creditor filing a lawsuit or applying for arbitration against the debtor before the period for suretyship expires, or the creditor of the joint and several suretyship requests the surety to assume the suretyship liability [10].

The prescriptive period for an general suretyship begins to run on the date on which the creditor files a lawsuit or applies for arbitration against the debtor and the surety's right to refuse to assume the liability for the undertaking is extinguished. The law does not directly state the exact time when the prescriptive period for general suretyship begins to run, but rather links it to the time when beneficium excussionis is extinguished. At the same time, Article 687 of the Civil Code lists four exceptions to the commencement rule of Article 694, making it difficult to determine the time of commencement. In addition, the Civil Code does not mention the circumstances may also have an impact on the running time of the prescriptive period, such as situations where the agreed period for suretyship is longer than the general three-year prescriptive period, and how to adjust the commencement time in cases of anticipatory breach by the principal debtor or the surety. Currently, there is no consensus in the academic community on these issues.

3.1. General Situations for the Commencement of the Prescriptive Period for Suretyship Obligations

In practice, the prescriptive period for suretyship obligation is mostly for the expiration of the grace period, or the creditor knows or should know that the surety refuses to fulfill the time to start counting. For example, after the principal debt becomes due, the period for suretyship begins, the creditor at this time require the surety to assume suretyship liability within 1 month. If the surety waives beneficium excussionis but does not assume suretyship responsibility within the one-month grace period, but not in 1 month grace period to assume suretyship liability, or the surety explicitly refused to perform, the suretyship claim is infringed, and the prescriptive period for the suretyship obligation begins.

In addition to this situation, the law also separately stipulates several special situations in the general suretyship where beneficium excussionis is extinguished, and the issue of aligning the period for suretyship with the prescriptive period for the suretyship obligation is worth discussing.

3.1.1. Failure of Creditors to Realize Their Claims After Legal Execution in Respect of the Property of the Principal Debtor

Article 28 of the Interpretation of the Supreme People's Court of the Application of the Relevant Guarantee System of the Civil Code of the People's Republic of China (hereinafter referred to as the "Judicial Interpretation of the Guarantee System") stipulates that a general surety enjoys beneficium excussionis prior to the compulsory execution of the property of the principal debtor. If the execution still cannot satisfy the debt, the prescriptive period starts from the day the court issues the ruling to terminate the execution. However, before the creditor applies for execution of the principal debtor's property after obtaining an effective document, if the principal debtor has not yet refused to perform or the execution has not failed, and the creditor's claim has not been damaged, the beneficium excussionis has not been extinguished, and the surety has the right to refuse to perform the suretyship obligation.

3.1.2. Four Exceptional Situations Specified in Article 687, Paragraph 2

According to Article 687, Paragraph 2 of the Civil Code, if the creditor has sufficient evidence to prove that the debtor is missing, bankrupt, unable to repay the debt, or the surety voluntarily waives the beneficium excussionis, the ordinary surety's beneficium excussionis is extinguished in advance, regardless of whether the debtor has been enforced. In cases of the debtor being missing or bankrupt, the parties will initiate processes such as declaring the debtor as missing or bankruptcy liquidation. For sureties who voluntarily waive the beneficium excussionis, the prescriptive period starts directly.

However, the provision "proving that the principal debtor's property is insufficient to repay all debts" is a very difficult issue in judicial practice, and scholars often hold a negative attitude towards its reasonableness. First, even if the debt has entered the execution stage, it is often difficult to determine whether the principal debtor has sufficient enforceable property, making it challenging for the surety to determine when the principal debtor constitutes a situation where the execution still cannot satisfy the debt [11]. Second, regarding the standard of "insufficient to repay all debts," if the creditor cannot provide evidence of the specific amount of the principal debtor's enforceable property, it will be very difficult for the court to determine the scope of the ordinary surety's responsibility [12]. In judicial practice, courts often rely on the execution ruling submitted by the creditor to determine that the principal debtor has lost the ability to perform and then decide to enforce the ordinary surety [13]. Courts have also recognized "the principal debtor's death due to illness" as a situation where the principal debtor has lost the ability to perform the debt [14].

According to Article 28 of the Judicial Interpretation on the Guarantee System, the prescriptive period for the suretyship obligation starts from the day the creditor knows or should have

known that the principal debtor cannot perform. The author believes that it is reasonable to start the prescriptive period for the suretyship obligation from the day the court issues the execution ruling. Although there are currently no cases in judicial practice where sureties raise the defense that the prescriptive period for the suretyship obligation has expired based on this rule, once the court determines the principal debtor's enforceable property and issues the execution ruling, it can legally prove that the principal debtor's property is insufficient to repay all debts, helping to determine the commencement time of the prescriptive period for the suretyship obligation and ascertain the infringement of the suretyship claim.

3.2. Adjustment of the Commencement of the Prescriptive Period for Suretyship Obligations in Special Situations

In addition to the general commencement rules and the exceptional situations explicitly stipulated by law, the agreements between the parties and their performance behaviors may also affect the commencement of the prescriptive period for suretyship obligations. For example, in cases of long-term suretyship agreements or anticipatory breach by the principal debtor or the surety, there are few academic discussions, and no consensus has been reached.

3.2.1. The Effect on the Running of the Extinctive Prescription for the Suretyship Obligation When the Parties Agree on a Long-Term Suretyship

"Long-term suretyship" is a special type of suretyship where the agreed period for suretyship between the creditor and the surety exceeds three years, which is the general prescriptive period. Regarding the validity of such contracts, there are different opinions: some believe that the period for suretyship is not a fixed statutory period and should be freely negotiated by the parties based on actual needs, hence long-term suretyship agreements should be considered valid [15]; others believe that such agreements are invalid as they aim to circumvent the mandatory provisions on the prescriptive period through prior agreements [16]; still, others believe that the part exceeding the three-year period should be deemed invalid [17].

Regarding the validity of long-term suretyship, the law does not set the period for suretyship as a mandatory statutory period, and it should follow the parties' agreement. Supreme Court precedents have supported the validity of long-term suretyship agreements [18]. Additionally, the period for suretyship differs from the prescriptive period as it cannot be interrupted, suspended, or restarted. Even in the case of long-term suretyship agreements, the prescriptive period can be restarted by the creditor's notice or the surety's consent to performance, resulting in a prescriptive period that is longer than the suretyship period. Therefore, the author believes that the current law allows for long-term suretyship agreements, and such agreements should be considered valid.

3.2.2. Impact of Anticipatory Breach on the Commencement of the Prescriptive Period for Suretyship Obligations

If the principal breaches the contract in advance, the creditor does not have to wait for the principal debt to become due in order to bring a claim against the principal debtor for breach of contract, and the time for the surety to assume responsibility starts to run at the same time. However, is it reasonable for the creditor to require the surety to assume liability in advance? How does this situation affect the commencement of the Period for Suretyship and the limitation period?

1) Impact of Principal Debtor's Anticipatory Breach on the Period for Suretyship and the Prescriptive Period for General suretyship Obligations

Regardless of whether the principal debtor's breach is reflected in non-payment of due debts or in an anticipatory breach, the creditor can sue or arbitrate in order to protect its claim. Therefore, if the principal debtor cannot repay the debt, the surety's beneficium excussionis

also disappears. But if the principal debt is not yet due, when does the period of the suretyship begin? Scholars have different views on this question:

The first view is that the principal debtor's anticipatory breach accelerates the principal debt, i.e. the performance period of the principal debt has ended early. The period for the suretyship starts to run when the creditor exercises its right to claim anticipatory breach against the principal debtor. This view is based on the accessory nature of the suretyship contract, which allows the creditor to require the surety to perform. It also encourages the creditor to actively exercise its rights by starting the limitation period for the surety's obligation when the creditor is aware of the anticipatory breach. Many judgments support this view [19].

The second view holds that, in case of anticipatory breach by the principal debtor, unless the surety also anticipatorily breaches, the surety's term benefits should be protected, and the creditor can only request the surety to assume suretyship responsibility after the principal debt is due [20].

The third viewpoint posits that, in instances of anticipatory breach by the principal debtor, the commencement of the suretyship period should be determined based on the stipulations set forth by the parties in the suretyship contract regarding the creditor's exercise of suretyship obligations in the event of anticipated breach. In the event that the suretyship contract contains provisions pertaining to anticipated breaches by the principal debtor, it is incumbent upon the parties to adhere to those stipulations. In the absence of such stipulations in the suretyship contract, the creditor may initiate legal proceedings against the principal debtor prior to the conclusion of the performance period of the principal obligation in accordance with Articles 687 and 694 of the Civil Code. In this scenario, since the period for suretyship has not yet elapsed, it is unnecessary to discuss issues related to the period for suretyship [21].

The author posits that, due to the accessory nature of the suretyship obligation and its purpose to ensure the creditor's rights are protected, the period for suretyship should be closely aligned with the performance period of the principal obligation, reflecting its supplementary nature. In the event that the principal debtor anticipates a breach, the creditor's expectation interest is infringed. In accordance with Article 578 of the Civil Code, the creditor is entitled to demand accelerated maturity of the debt and request the principal debtor to assume liability prior to the expiration of the performance period. In light of the purpose of the period for suretyship, namely to enhance the likelihood of the creditor's right being realised and to ensure the creditor can obtain the corresponding guarantee from the surety when the principal debtor cannot fulfil the obligation, it is evident that the period for suretyship should still follow the accelerated maturity of the principal obligation and commence simultaneously. In this instance, the potential for the period for suretyship to commence prematurely should be borne by the surety. Consequently, the author proposes that in instances of anticipated non-compliance by the principal debtor, the period for suretyship should commence simultaneously.

2) The Impact of the Surety's Anticipated Breach on the Prescriptive Period of the General suretyship

The term "Anticipated Breach" is used to describe a situation where, prior to the expiration of the period for suretyship, the surety explicitly or through its actions indicates that it will not fulfil its obligations under the suretyship contract. In contract law, anticipated breach infringes on the counterparty's reliance and expectation interests, rather than actual contract interests. However, in the case of a suretyship contract, the creditor's claim against an ordinary surety is accessory to the principal contract, and the ordinary surety assumes supplementary liability. Some scholars posit that the prescriptive period for the suretyship obligation commences upon the creditor's awareness of the breach [22].

It is therefore necessary to discuss the time of the establishment of the suretyship obligation in order to clarify whether the creditor's suretyship right is impaired upon the surety's

anticipated breach. The first viewpoint maintains that the suretyship obligation is established immediately upon the formation of the suretyship contract. The second viewpoint posits that the suretyship obligation is contingent upon the creditor initiating a claim within the prescribed period for suretyship. In the absence of a claim, the suretyship obligation does not arise. Although the first viewpoint is logically sound in asserting that the suretyship obligation arises upon contract formation, the actual performance by the surety is contingent upon whether the creditor requests it. This creates a logical consistency, but it conflicts with the accessory and supplementary nature of the suretyship contract. If the suretyship obligation arises immediately upon the formation of the suretyship contract, it results in two definite claims on the same debt. This turns the risk of the principal debtor's future non-repayment into a definite debt, which is inconsistent with the purpose of the suretyship contract and disadvantageous to the surety.

In light of the preceding discussion, the author postulates that the impact of the surety's anticipated breach on the prescriptive period of the general suretyship obligation warrants further investigation, with a particular focus on the distinction between instances where the principal obligation has matured within the prescribed period for suretyship.

Prior to the due of the principal obligation, although the suretyship contract has been formed, the suretyship obligation has not yet arisen. Consequently, the creditor's reliance interest in the surety's responsibility in the event of a breach by the principal debtor is impaired. However, since the principal obligation has not matured and there is no anticipated breach by the principal debtor, the suretyship obligation cannot be accelerated. In this instance, the creditor may either request that the surety assume responsibility for an anticipated breach in accordance with the terms of the suretyship contract, without the period for suretyship and prescriptive period commencing, or alternatively, wait until the period for suretyship expires to claim the suretyship right, with the prescriptive period for the suretyship obligation commencing upon the expiration of the period for suretyship.

Once the principal obligation has matured, and the principal debtor has failed to fulfil the obligation in a timely manner, the period for suretyship commences. In the event that the ordinary surety anticipates breach at this time, the question arises as to whether the suretyship obligation can be accelerated and whether the prescriptive period can commence simultaneously. Given that the surety's anticipated breach has already impaired the principal debtor's reliance interest and that the principal debtor is unable to perform the obligation, if the creditor seeks to hold both the principal debtor and the surety liable through arbitration or litigation, the surety's *beneficium excussionis* is extinguished and the prescriptive period begins. Consequently, in this scenario, the prescriptive period commences in the same manner as if the surety had not anticipated breach, without the necessity for separate statutory provisions.

4. Commencement of the Prescriptive Period for Joint and Several Suretyship

Compared to general suretyship, a creditor with a joint and several suretyship can demand performance from the surety before the principal debtor. Article 694, Paragraph 2 of the Civil Code delineates the circumstances under which the prescriptive period for joint and several suretyship obligations commences, including instances where the prescriptive period commences prior to the expiration of the relevant period. However, in the event that the creditor demands that the surety assume the suretyship obligation in anticipation of the principal debtor's breach before the principal obligation matures, the law does not clearly specify whether the prescriptive period for the suretyship obligation commences. In the absence of specific provisions addressing such matters as the surety's anticipated breach, it is

unclear whether the creditor may demand early performance from the surety or the principal debtor, and whether this would affect the commencement of the prescriptive period for the suretyship obligation. Prior to examining anticipated breach, it is imperative to differentiate the roles of the joint and several surety and the principal debtor. In contrast to debt assumption, the accessory and independent nature of the suretyship obligation means that the commencement, interruption, and expiration of the prescriptive period for the principal obligation do not automatically affect the prescriptive period for the suretyship obligation. This distinction is of the utmost importance in order to safeguard the rights of both the creditor and the surety.

4.1. The Expiration of the Prescriptive Period for the Principal Obligation Does Not Necessarily Lead to the Expiration of the Prescriptive Period for the Joint and Several Suretyship Obligation

With regard to the question of whether the prescriptive periods for the joint and several suretyship obligation and the principal obligation are consistent in length, the prevailing view prior to the promulgation of the Civil Code was that the lengths of the two prescriptive periods should be the same due to the accessory nature of the suretyship contract. However, following the promulgation of the Civil Code, the prevailing view has shifted. The second view posits that Article 701 of the Civil Code, which states that "the surety may invoke the defenses of the principal debtor," already reflects the accessory nature of the suretyship obligation. The prescriptive period for the joint and several suretyship obligation should be determined in accordance with the general rules of the prescriptive period. The surety is able to invoke the principal debtor's prescriptive period defence without needing to align the lengths of the two prescriptive periods due to the accessory nature of the suretyship obligation [23]. While supporting the aforementioned viewpoint, the author would like to present the following reasons for consideration:

Firstly, the legislation permits the duration of the suretyship period to be freely agreed upon by the parties. Article 2316 of the French Civil Code stipulates that "the mere extension of the principal debtor's obligation by the creditor does not release the surety from liability; in such cases, the surety may sue the principal debtor to compel repayment." [24] A similar perspective is evident in Chinese judicial precedents, which stipulate that alterations to the principal contract's performance period without the surety's written consent do not extend the suretyship obligation. In such cases, the surety is held liable in accordance with the statutory period of six months or the original agreed period for suretyship [25]. Thus, the performance period of the principal obligation and the period for suretyship are calculated separately, and the prescriptive periods cannot be consistently aligned due to objective circumstances.

Secondly, in accordance with Article 693, Paragraph 2, if the creditor fails to initiate legal proceedings against the principal debtor within the specified period, the suretyship obligation is deemed to have never existed. This stipulation reflects the objective of the period for suretyship, namely to prevent the suretyship obligation from persisting indefinitely and to prompt the creditor to exercise their rights within a reasonable time frame. The distinction between joint and several suretyship and general suretyship lies in the fact that the former is not supplementary. Consequently, the creditor is at liberty to pursue either the debtor or the surety. The Supreme Court has determined that when the creditor initiates a claim against the joint and several surety, the prescriptive period for the principal obligation is suspended [26]. However, if the creditor only initiates a claim against the principal debtor, it cannot be considered a claim against the surety. Consequently, the period during which suretyship is in effect is the statutory or agreed time frame for determining whether the suretyship obligation arises. The prescriptive period for the suretyship obligation is the statutory period within which the creditor must exercise the claim after the suretyship obligation has arisen. In the

event that the joint and several suretyship obligation has not arisen in accordance with the relevant legislation, it is not possible for the prescriptive periods of the suretyship and the principal obligation to be simultaneously concluded [27].

Thirdly, with regard to the distinction between debt assumption and joint and several suretyship, as set out in Article 693, Paragraph 2, and in the preceding discussion, it can be seen that the impact of the time elapsed after the maturity of the principal obligation on the suretyship obligation differs according to the mandatory application of the period for suretyship. The period for suretyship is typically shorter than that for the principal obligation. If the creditor does not claim the suretyship responsibility within this period, the suretyship obligation may extinguish earlier than the principal obligation [28]. The status of the debt assumer should be determined by reference to the performance period and the prescriptive period of the principal obligation, which are distinct from the period for suretyship. Consequently, when the prescriptive period for the principal obligation has not yet elapsed, but the period for suretyship has, and the suretyship obligation has been extinguished, there is no necessity to discuss the prescriptive period for joint and several suretyship. However, the debt assumer must still fulfil their repayment obligations.

In conclusion, the author postulates that the prescriptive periods for the principal obligation and the joint and several suretyship obligation are calculated separately. Consequently, the expiration of the prescriptive period for the principal obligation does not necessarily lead to the expiration of the prescriptive period for the suretyship obligation due to its accessory nature.

4.2. Commencement of the Period for Suretyship for Joint and Several Suretyship Obligation in Cases of Anticipated breach

Given the distinct nature of suretyship and principal obligations, the joint and several liability of suretyship does not necessitate aligning the prescriptive periods due to its joint and accessory nature. It is therefore necessary to separately discuss the commencement of the prescriptive period for joint and several suretyship liability. In the event of an anticipated breach by the principal debtor or surety prior to the maturity of the principal obligation, it is necessary to consider whether the prescriptive period for the suretyship obligation commences directly in accordance with Article 694, Paragraph 2 of the Civil Code, starting from the creditor's claim, should be discussed in different scenarios.

4.2.1. Impact of the Principal Debtor's Anticipated Breach on the Commencement of the Extinctive Prescription for the Suretyship Obligation

In accordance with Article 688, Paragraph 2 of the Civil Code, the parties are at liberty to agree upon the conditions under which the surety should perform the suretyship obligation. This may include the inclusion of the principal debtor's or the surety's anticipated breach as a condition for the creditor to demand the surety's responsibility before the maturity of the principal obligation. Nevertheless, some legal scholars contend that in the absence of a stipulation regarding the anticipated breach of the principal debtor, the commencement of the suretyship obligation can be determined by the creditor's assertion of the anticipated breach liability of the principal debtor. This allows the creditor to claim against both the principal debtor and the surety simultaneously in cases of anticipated breach. In such a scenario, the surety is unable to argue that the period for suretyship has not yet commenced as a defence [29]. Nevertheless, in the event that the creditor only asserts a claim against the surety without also claiming anticipated breach liability, the surety may invoke the non-commencement of the period for suretyship as a defence and decline to fulfil the obligations of suretyship [30]. This suggests that, in the event that the creditor asserts the anticipated breach liability, the creditor is entitled to declare the debt immediately due and to exercise their rights accordingly. The creditor may request that the principal debtor fulfil the obligation within a reasonable period or alternatively

request joint and several payment from the surety. The prescriptive period for the suretyship obligation should commence on the date on which the creditor simultaneously claims the anticipated breach liability from both the principal debtor and the surety [31].

The author posits that this viewpoint is logical, based on Article 578 of the Civil Code. In the event that one party to a contract indicates anticipated breach, the creditor is entitled to claim accelerated maturity and demand liability from the principal debtor before the expiration of the performance period. This extends the same liability to the joint and several surety. However, if the creditor does not claim against the principal debtor in advance, the creditor is not entitled to demand the surety's responsibility. In such cases, the period for suretyship will commence after the expiration of the performance period of the principal obligation, thereby allowing the creditor to claim the suretyship responsibility. This reasoning is analogous to that applied in cases of anticipated breach by the principal debtor under general suretyship. In practice, if the principal debtor anticipates breach and the creditor only sues the surety, the latter is entitled to invoke the benefit of the period. Conversely, if the creditor sues both the debtor and the surety, the surety is obliged to assume the suretyship obligation. This ensures that the creditor's claim against the surety is based on a valid right established by claiming against the principal debtor first, rather than granting the surety a *beneficium excussionis*. The foundation for the creditor's claim against the surety is thus established.

4.2.2. Impact of the Surety's Anticipated Breach on the Commencement of the Prescriptive Period for Suretyship

In the event of an anticipated breach by the joint and several surety prior to the maturity of the principal obligation, the author posits that the situation is analogous to that of general suretyship. Prior to the maturity of the principal obligation, although the suretyship contract has been formed, the suretyship obligation has not yet arisen. The joint and several surety differs from a debt assumer, in that it only ensures the realisation of the suretyship obligation. However, if the principal debtor has not anticipated breach, the suretyship obligation cannot be accelerated. The creditor can claim anticipated breach liability based on the suretyship contract, or replace the surety.

5. Conclusion

This paper focuses on the relationship between the period for suretyship and the prescriptive period of the suretyship obligation from the following two aspects: firstly, the paper analyzes the inappropriateness of the prescriptive period of the general suretyship in connection with the right of prior defense. It also analyzes the ambiguities of the starting point of the prescriptive period in the case that the principal debtor proves to be incapable of performance and the creditor fails to apply for execution after obtaining the instrument under Article 687 of the Civil Code and the Judicial Explanation of the Guarantee System. It examines the coordination of the period for suretyship and the prescriptive period in long-term guarantees and in cases where the principal debtor and the surety respectively anticipate a breach of contract. Secondly, under joint and several suretyship, the paper delves into the relative independence of the prescriptive period of the suretyship obligation and the prescriptive period of the principal obligation. And it argues against the prevailing view that the prescriptive period of the suretyship obligation under joint and several liability should be consistent with the prescriptive period of the principal obligation. By analyzing Articles 578, 694, and 688 of the Civil Code, as well as the distinctions between joining in the obligation and joint and several suretyship, the author ultimately concludes that under the framework of the Civil Code, when the principal debtor anticipates a breach, the creditor can require the surety to assume suretyship responsibility before the due date, and the prescriptive period of the suretyship

obligation begins earlier. However, when the surety anticipates a breach, the prescriptive period cannot commence early.

References

- [1] L. Wang: Research on Contract Law (Vol. 4) (China Renmin University Press, China 2018, p.313).
- [2] Urumqi Civil Explosive Materials Special Sales Company vs. China Cinda Asset Management Company Urumqi Office, Loan Guarantee Contract Dispute Case, The Supreme People's Court, Civil Judgment No. (1999) Jing Zhong Zi No. 348.
- [3] See Y. Lu: On the Period for Suretyship and Extinctive Prescription (MS., East China University of Political Science and Law, China 2005), p.14.
- [4] See X.J. Kong: Further Discussion on the Period for Suretyship, Law Science, (2001) No. 7, p.57-58; See S.P. Gao: Theory of Guarantee Law (Law Press, China 2009, p.135).
- [5] L.X. Liu, X.L. Wang: Period for Suretyship and Extinctive Prescription, Cooperative Economy and Technology, (2023) No. 4, p.188-189.
- [6] L.X. Liu, X.L. Wang: Period for Suretyship and Extinctive Prescription, Cooperative Economy and Technology, (2023) No. 4, p.189; J.Q. Ye: Principles of Guarantee Law (Science Press, China 2002, p.57).
- [7] W. Yang: Commentary on the Amendment of Period for Suretyship Rules in the Civil Code, Hebei Law Science, Vol. 25 (2020) No. 9, p.40-41.
- [8] J.Q. Ye: Principles of Guarantee Law, Science Press (China 2002, p.57); Y.G. Wang: On the Commencement of the Extinctive Prescription for the General suretyship, Journal of East China University of Political Science and Law, (2021) No. 3, p.20; W. Huang, ed.: Interpretation of the Contract Section of the Civil Code of the People's Republic of China (Volume 1) (China Legal Publishing House, 2020, p.767).
- [9] Y.G. Wang: On the Commencement of the Extinctive Prescription for the General suretyship, Journal of East China University of Political Science and Law, (2021) No. 3, p.21.
- [10] W. Yang: Commentary on the Amendment of Period for Suretyship Rules in the Civil Code, Hebei Law Science, Vol. 25 (2020) No. 9, p.40-41.
- [11] Y.G. Wang: On the Commencement of the Extinctive Prescription for the General suretyship, Journal of East China University of Political Science and Law, (2021) No. 3, p.25.
- [12] X. Cheng, S.P. Gao, H.F. Xie: Understanding and Application of the Judicial Interpretation of the Guarantee System in the Civil Code by the Supreme People's Court (People's Court Press, 2021, p.291).
- [13] Judgment of the Second Instance of the Contract of Suretyship Dispute between Zhang Yanfang and Zhang Huimin, Intermediate People's Court of Shizuishan City, Ningxia Hui Autonomous Region, Civil Judgment No. (2023) Ning 02 Min Zhong 274.
- [14] Civil Judgment of the First Instance of the Private Loan Dispute between Liu Moumou and Wu Mou1, People's Court of Qinggang County, Heilongjiang Province, Civil Judgment No. (2023) Hei 1223 Min Chu 1588.
- [15] S.P. Gao: The Effectiveness and Calculation of the Period for Suretyship in the Civil Code, Journal of Gansu University of Political Science and Law, (2020) No. 5, p.77-92; The Supreme People's Court's Response on Whether the Agreement on the Period for Suretyship Exceeding Two Years is Valid (2001) Min Er Ta Zi No. 27 states: "The agreement on the period for suretyship exceeding two years

in the contract of suretyship shall be deemed valid. The surety of the joint and several suretyship shall bear joint liability within the period for suretyship."

- [16] See B.Y. Liu, W.J. Lü, eds.: Research on the System of Creditor's Rights and Guarantees (China Democracy and Legal System Press, China 2000, p.141-142). The second paragraph of Article 2 of the "Opinions of the Civil Second Tribunal of the Shaanxi Provincial Higher People's Court on Several Legal Issues in the Trial of Guarantee Dispute Cases" stipulates: "If the parties agree that the period for suretyship exceeds two years, the determination of the period shall be limited to the prescriptive period of the principal debt, and the excess part shall be invalid."
- [17] Tian Di Metallurgy vs. Henan Company, Changrun Company, Wutai Company, Huarong Company, Jiangsu Nengbowang Storage Company, Jiangsu Nengbowang Steel Company, Sales Contract Dispute Case, Nanjing Intermediate People's Court of Jiangsu Province, Civil Judgment No. (2012) Ning Shang Chu Zi No. 61.
- [18] Re-trial Case of Private Loan Dispute between Zhang Qing and Peng Zhongyou, The Supreme People's Court, Civil Judgment No. (2019) Zui Gao Fa Min Shen 6911.
- [19] Agricultural Bank of China Co., Ltd. Shanxian Branch vs. Fangda Carbon New Material Technology Co., Ltd., Sanmenxia Huineng Thermal Power Co., Ltd., Financial Loan Contract Dispute Appeal Case, The Supreme People's Court, Civil Judgment No. (2014) Min Er Zhong Zi No. 147; Beijing Changfu Investment Fund vs. Wuhan Zhongsenhua Century Real Estate Development Co., Ltd., Entrusted Loan Contract Dispute Appeal Case, The Supreme People's Court, Civil Judgment No. (2016) Zui Gao Fa Min Zhong 124; Dujiangyan Modern Agricultural Development Investment Co., Ltd. vs. Rongtai Tianyi Investment Guarantee Co., Ltd., Guarantee Contract Dispute Appeal Case, Sichuan Provincial Higher People's Court, Civil Judgment No. (2015) Chuan Min Zhong Zi No. 133.
- [20] See Y.X. Jin: Loan Contract Litigation (People's Court Press, China 2001, p.176); X.X. Wang: Special Topics on Bankruptcy Law (Law Press, China 2002, p.222). For similar cases, see Re-trial Case of Guarantee Contract Dispute between Yang Dongsheng, Sun Xiaojie, Zhang Guifen and China Construction Bank Corporation Shijiazhuang Jinqian Branch, The Supreme People's Court, Civil Judgement No. (2013) Min Shen Zi No. 1717.
- [21] S.P. Gao: Third Discussion on the Calculation of the Period for Suretyship under Special Circumstances, Law Journal, (2021) No. 4, p.65.
- [22] H.L. Bie: On the Period for Suretyship and the Extinctive Prescription for Suretyship Obligation (MS., Yantai University Law Department, China June 2021), p.33.
- [23] G.B. Shi: On the Relevance of the Extinctive Prescription for Guarantee Debts and Principal Debts, Zhejiang Social Sciences, (2020) No. 12, p.61.
- [24] French Civil Code, <https://www.wipo.int/wipolex/en/text/450530>.
- [25] Shanghai Pengpu Bath Co., Ltd. et al. vs. Shanghai Qingning Real Estate Co., Ltd. et al., Loan Contract Dispute Appeal Case - Exploration of the Practice of Guarantee Responsibility's Period and Exemption, Shanghai Second Intermediate People's Court, Civil Judgement No. (2012) Hu Er Zhong Min Liu (Shang) Zhong Zi No. 88.
- [26] Re-trial Review and Trial Supervision Civil Ruling of Ship Operation Loan Contract Dispute between Mou Hua, Li Moufang, The Supreme People's Court, Civil Judgement No. (2019) Zui Gao Fa Min Shen 5979.
- [27] See L. Wang, L.X. Yang, Y. Wang, X. Cheng: Civil Law (Sixth Edition) (Law Press, China 2020), p.799.
- [28] S.P. Gao: The Effectiveness and Calculation of the Period for Suretyship in the Civil Code, Journal of Gansu University of Political Science and Law, (2020) No. 5, p.92.

- [29] See J. Qin: On the Period for Suretyship, *Ming Shang Fa Lun Cong*, Vol. 26, Jinqiao Culture Publishing (Hong Kong) Co., Ltd., 2003, p.486.
- [30] S.P. Gao: The Effectiveness and Calculation of the Period for Suretyship in the Civil Code, *Journal of Gansu University of Political Science and Law*, (2020) No. 5, p.63.
- [31] K. Qiu, J.H. Xuan, Civil Judgment of the First Instance of the Private Loan Dispute, Zhejiang, Jinhua Wucheng District People's Court, Civil Judgment No. (2023) Zhe 0702 Min Chu 4482; the Second Instance of the Contract of Suretyship Dispute between Yan Fengsheng, Zhao Xiaoli et al. vs. Huang Aibing, Jiangxi, Xinyu City Intermediate People's Court, Civil Judgment No. (2023) Gan 05 Min Zhong 299.