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On the Calculation of the Term of Suretyship under Special Principal Contracts

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Abstract: After the enforcement of Civil Code of the People's Republic of China and the complementary Interpretation of the Guarantee System, there are still a number of issues that need to be clarified with respect to the starting point and duration of the term of suretyship under a special principal contract. After summarizing the existing judicial practice and academic discussions on a large number of related issues, propose some advice on the starting point of the term of suretyship under typical circumstances. When the principal contract is installment debt, the term of suretyship should be started from the date of expiration of the last installment of the debt; When the principal debtor is expected to default, the creditor should be given the right of free choice. If the creditor chooses to claim default liability from the debtor in advance, the term of suretyship should be started from the date of claim; if it does not, the term of suretyship should be started from the date of expiration of the principal obligation; When the principal contract is rescinded, the term of suretyship should be started from the date on which the creditor may claim civil liability for the rescission of the principal contract; where a counter-suretyship exists in addition to the principal contract, the term of suretyship should be started from the date on which the surety actually assumes his suretyship liability.

Keywords: Civil Code; The Term of Suretyship; Installment Debt; Counter-suretyship.

1. Introduction

The Civil Code of the People's Republic of China (hereinafter "Civil Code") provides for a term of suretyship to protect the interests of the surety and to urge the creditor to exercise his rights in a timely manner [1]. When the term of suretyship passes, if the creditor does not actively claim rights within this term, the surety can therefore no longer assume the suretyship liability. As the term of suretyship has such mandatory legal effect, how to calculate the term of suretyship is particularly important for the balance of interests of creditors and sureties. The Civil Code provides general rules for the calculation of the term of suretyship.

However, neither the Civil Code nor the Interpretation of Supreme People's Court on Application of the Security System under the Civil Code of the People's Republic of China (hereinafter "Interpretation of the Security System") provides or responds to the question of how to determine the starting point of the term of suretyship in the event of special circumstances arising out of the principal contract. For example, the principal contract is a installment debt; or special circumstances occur during the performance of the principal contract, such as the expected default of the debtor of the principal contract and the rescission of the principal contract; or there is a counter-suretyship under the principal contract. In addition, for the principal contract on the term of suretyship of the agreement, what circumstances will be recognized as "unclear agreement", thereby enforcing the application of the statutory term of suretyship, or whether the agreement of the term of suretyship is too long or too short will affect the effectiveness of the agreement, in the existing legislative documents can not be found in the definitive answer. In the existing judicial practice, when encountering the above special circumstances, due to the lack of clear legal provisions as a guide, there are different approaches. The authors intend to discuss the specific rules under the above special circumstances on the basis of the existing judicial practice.

2. Starting Point of the Term of Suretyship under the Special Principal Contract

In fact, the key to defining the starting point of the term of suretyship in the above special circumstances lies in how to interpret the "date of expiration of the period for the performance of the principal obligation" stipulated in the law under different circumstances. Obviously, the problem cannot be solved by merely applying the ordinary method of textual interpretation, but also needs to be considered from the nature of the principal contract itself, the legal value orientation, judicial efficiency and other perspectives.

2.1. When the Principal Obligation is an Installment Debt

When the principal obligation is an installment debt, there are opposing approaches in practice. The issue lies in whether the debt should be regarded as a collection of individual debts and the starting point of the term of suretyship should be calculated separately, or whether the debt should be regarded as an indivisible whole and the date of expiration of the period of performance of the last installment of the debt should be taken as the starting point of the term of suretyship. The minority believes that the starting point of the term of suretyship should be calculated from the date of expiration of the period of performance of a certain period of the debt [2], while the majority believes that it should start from the date of expiration of the period of performance of the last period of the debt [3]. Which view is more reasonable can be analyzed from the following perspectives.

2.1.1. The Divisibility of Installment Debt

The biggest difference between these two views lies in the

divisibility of the installment debt. It cannot be judged on the basis of "instalment" alone, because certain instalments are closely and inextricably linked to each other and cannot be generalized. They need to be considered together with other factors.

From the perspective of the subject matter of payment, such as a right or a thing co-owned, which is indivisible in form or loses or forfeits its economic utility if separated, an installment debt with this type of object as the payment subject matter is indivisible; it can also be examined in terms of the purpose of the contract. The purpose of a contract is generally involved in the case of fundamental breach of contract, which is one of the statutory grounds for rescission of the contract. Analyzing the practice in the United States Uniform Commercial Code, the Swiss Code of Obligations, the United Nations Convention On Contracts For The International Sale Of Goods, for the instalment debt, they both use whether the performance of a certain period of debt affects the purpose of the contract as a criterion for determining whether the contract can be rescinded or not; in addition, in academia, there is an opinion holds that in installment debts, the breach of obligation resulting in the inability to rely on its future performance can also lead to the rescission of the contract. If it is clear that a defect in one of the prior performance of a party is going to be repeated in the whole performance, the other party can rescind the contract even though the defect in the prior performance itself does not constitute a ground for the recission of the contract [4]. This also recognizes, to some extent, the divisibility of the installment debt. Therefore, from the purpose of the contract to examine the divisibility of the installment debt is both supported by legislation and theory. It can be concluded that, with the exception of certain debts between periods that are closely connected, it should be recognized that instalment debts have divisibility in general. Therefore, there is a certain jurisprudential basis for supporting the separate calculation of the term of suretyship in installments.

Analyzing further, they believe that the installment debt is independent within a certain period of time, according to the subordination of the suretyship contract, the obligation of suretyship should also be independent. So the principal contract should be regarded as a collection of individual independent debts, so that the suretyship is also "deconstructed" into individual ones, corresponding to the amount of the principal obligation. Therefore, the creditor needs to request the surety to bear the suretyship liability at the time of expiration of each installment of the debt.

However, someone argue that there is special nature for installment debts that is accompanied by a suretyship contract. They argue that, for such installment debts, the acts of performance in installments are part of a complete contractual relationship, and installment debts are related to each other and cannot be construed as individual and divisible debts. Based on such nature, the creditor can only claim rights from the surety after the expiration of the last installment. Therefore, the principle of "rights are limited as they arise" cannot be applied. The suretyship should be regarded as for the whole obligation. Even if the principal contract expressly provides for the performance of the suretyship contract in installments, it is only a special agreement on the manner of performance [5]. It does not mean that the suretyship obligation can be divided into individual debts, thus allowing the surety to be exempted from the obligation if the creditor fails to claim his rights from the surety after the expiration of a certain debt.

2.1.2. The Balance of Legal Value

In addition to exploring the nature of the obligation itself, it can also be analyzed from the perspective of the legal value balance. Value judgments are at the heart of civil law issues. Generally speaking, the parties to a contract determine the value of their respective acts of performance through the exercise of their autonomy. However, when there is a conflict of interests between the two subjects, the civil law has to set up corresponding coordination rules to maintain the harmony of the social order. The key to determine the starting point of the term of suretyship lies in how to balance the interests of the creditor and the surety.

From the perspective of the rights and obligations, proponents of the view that the term of suretyship should be started from the expiration of each installment of debts respectively argue that, at the time an installment becomes due, the creditor has the right to claim his rights from the debtor. And at that time, if the debtor fails to perform the obligation as it becomes due, the creditor has the right to claim a suretyship from the surety. Then, according to the principle of "rights are limited as they arise", the creditor's right should be limited by the term of suretyship at the same time [6]. Moreover, the creditor has the right to choose to claim the right from the surety at the expiration of each installment or last installment of the debt, but once the creditor claims in installments, the surety cannot defense to require the creditor to claim the right until the expiration of the last installment of the debt. Such a pattern obviously creates the inequality of rights and obligations. Moreover, this view also believes that the installment calculation of the term of suretyship can substantially protect both the creditor and the surety. The creditor claims his right from the surety after the expiration of each period of obligation, which is not only conducive to the timely realization of his own claim, but also serves as a reminder to the surety. The surety can be informed of the status of the performance of the obligation and will take timely measures to safeguard his own interests. In addition, the court adopted such a view made a balance of the interests between the creditor and the surety on the surface. It pointed out that due to the expiration of the term of suretyship of an installment debt, the scope of exemption of the surety's liability is only limited to the due obligation, but does not extend to all the obligation [7].

It is not difficult to see that the above view is inclined to protect the interests of the surety. But the authors believe that, in fact, in the " lighter weight on the scale " end is actually the creditor, not the surety. If there is no unfree or defective expression of intent, the surety are voluntarily assume the risk that the debtor cannot perform the obligation on time. After all, the function of the suretyship contract is as the "protection" and "relief" when the debtor cannot perform the obligation on time. But when the creditor concludes the contract, his intention is to expect the debtor to be able to perform the obligation on time. If the debtor fails to perform the obligation on time, this is contrary to the legitimate expectations of the creditor because he is not voluntarily to be exposed to such a risk. In addition, the surety only needs to perform his liability when the debtor fails to perform the due obligation. The surety's obligation is also secondary under the general suretyship. Therefore, it would undoubtedly be unfair to burden creditors in a "weaker" position with the burden of timely requesting the surety to assume the suretyship liability.

Therefore, a better balance between the interests of the

creditor and the surety is achieved by taking the date of expiration of the last installment of the debt as the starting point for the term of suretyship. Moreover, it is not necessarily in the surety's interest to calculate the term of suretyship separately. If the debtor fails to perform the obligation at the expiration of each installment, the resulting liquidated damages or delay interest may also be included in the scope of the surety's suretyship liability, which, in turn, aggravates the surety's liability without his consent.

2.1.3. The Judicial Efficiency

It seems that it is still difficult to reconcile the divergence between the above two views. Without appropriate laws and institutions, the market will not produce efficiency in the sense of maximizing any value. We can also regard the judicial process as a market, a market that allocates judicial resources. Both the allocation of resources by the legal system and the judicial process should pursue efficiency. So it is worthwhile to analyze the above two views from the perspective of maximizing judicial efficiency and optimizing the allocation of judicial resources.

If the term of suretyship is started from the date of expiration of each installment, the creditor must claim the right once in each due obligation. This may make it difficult for the creditor to realize his rights through the suretyship. So he may be reluctant to choose this type and instead choose the security contract to realize his rights. Therefore, this may render the suretyship contract meaningless. Alternatively, the creditor may simply choose to enter into a contract with a debtor that is more creditworthy and qualified. For example, in commercial activities, the creditor may choose to sign a contract with a company with larger capital rather than cooperate with a growing small and medium enterprise (SME) with insufficient qualifications, thus hindering the SME's chances of growth and development. In particular, under a general suretyship, the creditor must also claim his rights by way of litigation or arbitration, which undoubtedly increases the burden of them. Moreover, after the expiration of the term of suretyship, if the creditor has not claimed his rights in the manner prescribed by law or has not claimed his rights at all, the judicial authorities will be faced with the problem of deciding whether the exemption of the surety's liability should be extended to the due debt or to the entire debt. And in the case of the former, it will have to clarify the scope of the suretyship liability corresponding to each installment of the debt. In this way, it will make the judicial decision become more complicated, which not only reduces the efficiency of litigation, but also wastes the judicial resources.

2.1.4. Legislative and Judicial Inspiration

In addition to the above perspectives, it is also feasible to return to the reasoning in the existing judicial practice and relevant provisions in the legislation.

As early as 2005, the Supreme People's Court in the discussion of installment debt of the limitation period of the starting point made a reasoning. It held that when the surety signed the suretyship contract, he was intended to make a general commitment to the period of installment debt [8]. So the starting point of the limitation period should be the time of the last due date. This reasoning should also apply to the starting point of the term of suretyship. In recent years, the courts have even directly invoked the provisions on the calculation of the limitation period for installment debts as the method of calculating the term of suretyship when the principal obligation is an installment debt [9]. In addition, it is worth noting that the practice generally recognized that such a rule is only applicable to the "same debt in installments". If it is not the "same debt", but "different debts", the time of the last due debt cannot be regarded as the starting point of the term of suretyship, but should be calculated according to the date of expiration of the respective period of performance of each debt [10]. Otherwise, too much prolongation of the surety's period of liability, will undoubtedly make the surety into the burden of suretyship liability in a long term, and will also leave the creditor the opportunity to abuse the term of suretyship.

Moreover, although the limitation period and the term of suretyship are not the same things, they have similarity in substance. They both have the function of urging the right holder to exercise the right in time and protect the obligor from the constraints of the long pending legal relations [11]. Therefore, such an analogous application is also reasonable.

2.2. When the Principal Debtor is Expected to Default

In addition to cases where the principal contract itself may have a special nature, certain events may occur during the performance of it that complicate the calculation of the term of suretyship. In such cases, when the principal obligation becomes due is the key.

Article 681 of the Civil Code clarifies that the circumstances under which a creditor may request a surety to assume the suretyship liability are not limited to "the debtor's failure to perform the due obligation". The creditor also has the right to request the surety to assume his liability under "a circumstance agreed by the parties". Article 578 of the Civil Code gives a party the right to request the other party to assume the liability for breach of contract before the expiration of the period of performance when the other party is expected to default. Therefore, when the principal debtor is expected to default, it becomes possible for the creditor to request the surety to assume the suretyship liability in advance. Under this circumstance, what the starting point of the term of suretyship is, there are mainly the following three views in the academic and practice. The first is that the starting point of the term of suretyship and the creditor has the right to request the surety to assume the suretyship liability of the same point in time; The second is that the creditor may advance his claim from the surety, but the starting point of the term of suretyship remains unchanged; The third is that the starting point of the term of suretyship should be advanced with it.

2.2.1. The Balance of the Interests between the Creditor and Surety

The contention between the above three views is whether the interests of the creditor or the surety should be favored. The first view favors the protection of the surety. It holds that unless the surety is also expected to default, the starting point of the term of suretyship should remain unchanged.

The creditor must still wait until the principal obligation becomes due before requesting the surety to assume liability, and the starting point of the term of suretyship should be considered to be the same as the same as that point in time. In practice, there are a few judicial decisions in favor of this view. The main reason they given is that a change in the period of performance of the principal contractual obligation does not ipso facto result in a change in the term of suretyship [12].

But this point of view for the protection of the interests of the surety may not be able to achieve the effect it seeks. The surety's right of recovery against the debtor can only be

realized after the surety has assumed liability to the creditor. If the starting point of the term of suretyship is stipulated to the original principal obligation due date, then, after the surety is liable to the creditor, the debtor's solvency may be even more insufficient, and the surety is likely to end up in the predicament of not being able to realize the right of recovery.

Another opposite view focuses on protecting the interests of creditors, hoping to enable creditors to obtain timely satisfaction from the surety in the event of the principal debtor's expected default, and to claim suretyship liability from the surety in advance accordingly. It believes that the creditor has the right to request the surety to assume liability in advance in the case of the principal debtor's expected default, but the starting point of the term of suretyship remains unchanged. It distinguishes between the point at which the term of suretyship begins to run and the point at which the creditor is entitled to claim the suretyship liability.

But this view also has certain problems. According to this point of view, the creditor has the right to request the suretyship liability before the due date of the debt, but at this time the term of suretyship has not begun to count. This practice is in fact a prolongation of the term of suretyship. It overly burdens the surety and unduly favors the interests of the creditor. Moreover, such a theory has not found sufficient support in practice.

Therefore, the third view is a better balance between the interests of the creditor and the surety, i.e., the creditor has the right to request the surety to assume the suretyship liability before the principal obligation becomes due, and the starting point of the term of suretyship is then advanced.

2.2.2. Relationship between the Suretyship and Principal Obligation

Besides, the third point of view also has some basis, based on the relationship between the suretyship and the principal obligation. It believes that the suretyship is subordinate to the principal obligation, then when the principal obligation becomes due in advance, the term of the suretyship shall also be advanced. The principal debtor is expected to default, the creditor's right to the debtor's claim can be realized in advance, the surety as the principal debtor's joint and several liabilities or supplemental liabilities, from this time onwards should also begin to assume liability. Therefore, the creditor's right should be subject to the limitations of the term of suretyship at the same time, and can also avoid the occurrence of the surety in the first of the above view is difficult to realize the right of recovery from the debtor.

How to determine the specific starting point? Some scholars pointed out that it should start from the date of the creditor demand the debtor to assume the responsibility of expected breach of contract. But the time when the creditor requests the debtor to assume the liability is pending and uncertain for the surety. As long as he did not claim liability from the surety after the expiration of the term of suretyship, the creditor enjoys almost absolute freedom. Once the creditor has been negligent in asserting his rights and has dragged his feet until close to the end of the term of suretyship, the circumstances described above in the objection to the due date of the obligation may still arise.

2.2.3. Giving Creditors the Right to Choose

As argued above, the starting point of the term of suretyship should, on the whole, coincide with the point at which the creditor has the right to claim liability from the surety, in order to ensure that the interests of the creditor or the surety are not unduly skewed.

At the same time, the civil law with autonomy at its core should not interfere with the creditor whether to claim rights in advance. Instead, it should give the creditor the freedom to choose whether to claim the right of default liability in the principal contract before the expiration of the original period of performance. Specifically, if the creditor chooses to claim in advance, in the case of a general suretyship, because he has already claimed his rights in time, it is unnecessary to discuss the starting point of the term of suretyship. In the case of joint and several suretyship, the term of suretyship should be advanced accordingly [13]. If the creditor did not choose to claim rights in advance, the starting point of the term of suretyship is still in accordance with the agreement of the contract or the provisions of the law.

Of course, if it is expressly agreed in the contract that expected default is to be the circumstance for which the surety assumes liability, the term of suretyship shall begin to run from the date on which the creditor knew or should have known of the principal debtor's expected default. Because the contract has clearly agreed that the creditor enjoys the right to claim the liability for breach of contract in advance, the creditor may no longer neglect to exercise the right for any reason and may no longer have the option of claiming the right before the due date of the principal contract. The criterion of what the creditor knew or ought to have known is based on the fact that the creditor does not ipso facto have knowledge of the event on the date it occurs. If the term of suretyship begins to run at a time when the creditor did not or could not have known that the principal debtor was in an expected fault, it would not be in a position to preserve his own interests.

This approach, on the one hand, urges the creditor to claim his rights from the surety in a timely manner, so as to avoid extinguishment of the suretyship liability due to the expiration of the term of suretyship, and on the other hand, it also empowers the surety to take advantage of the above rule to actively defense.

2.3. When the Principal Contract is Rescinded

The creditor may be entitled to rescind the principal contract because of the debtor's delayed performance or explicit refusal to perform. Under this circumstance, the starting point of the term of suretyship should also make certain adjustments. But the issue is also to explore what the principal obligation due date is in essence.

Article 566 (3) of the Civil Code stipulates that when the principal contract is rescinded, the surety's liability is not exempted unless otherwise agreed by the parties. So, even if the principal contract is rescinded due to the debtor's default, the surety shall still be liable to the creditor. After the rescission of the principal contract, whether the term of suretyship should make corresponding changes, there are two main views. One believes that the starting point of the term of suretyship should remain unchanged and should be the due date of the principal contract, while the other holds that it should be the date on which the creditor can claim the civil liability for rescission of the principal contract.

In practice, a few courts had been in favor of the first view. The courts made such a judicial decision did not make too much reasoning, and even took it for granted [14]. Such an approach not only lacks any legal basis, but also fundamentally ignores the interests of creditors.

The purpose of the suretyship system is to protect the

interests of creditors in the debtor's failure to perform in a timely manner [15]. The principal contract has been rescinded, if the surety continues to be allowed to enjoy the benefits of the term of suretyship, and the creditor still needs to wait until the due date of the principal obligation before claiming rights from the surety, it will make it difficult for the creditor's claim to be realized in time, or even fall through. Therefore, more courts support the second view [16]. The authors also support that the surety should no longer be over-protected by the term of suretyship in the case of the rescission of the principal contract, but should advance its starting point to the date when the creditor can claim the civil liability due to the rescission of the principal contract.

2.4. When a Counter-Suretyship Exists but no Term of Suretyship has been Agreed

It is also possible that other contracts exist under the principal contract in practice. In order to ensure the realization of his right of recovery from the debtor after assuming the suretyship liability, the surety may require the debtor or a third party to provide a further security for this recovery, i.e. a counter-security [17]. When this counter-security is provided in the form of a suretyship, if the parties have agreed on it, the starting point of the term of suretyship remains as agreed, but if they have not agreed on it, the question of how to determine the starting point of the term of suretyship arises again. In this case, like the above three cases, only through a variety of ways to explain the "due date of the principal obligation" is not feasible. Because in such cases, it is no longer a purely contractual relationship between the creditor and the surety but encompasses the security relationship between the creditor and the surety, and the counter-suretyship relationship between the surety and the counter-suretyship provider (the debtor or a third party).

There are four main views on such complex situations. The first view believes that the suretyship liability of the counter-suretyship does not have the issue of term of suretyship because it only subjects to the limitation period. If the surety does not claim his rights within the limitation period, the counter-surety can be exempted from the suretyship liability; the second view believes that the starting point of the term of counter-suretyship can be directly referred to the rule of the term of suretyship, that is, the due date of the principal obligation; the third view believes that it should be started from the date of claiming rights of the surety to debtor or counter-surety; and the fourth view believes that the date of actual performance by the surety should be taken as the starting point for the term of suretyship.

2.4.1. Analogous Application of the Law

The analogical application refers to the process of applying the law when there is a loophole in the legislation and there is no explicit provision applicable to the disputed case, in order to fill the loophole in the law, similar provisions are invoked and applied by analogical reasoning based on the similarity between the case in dispute and the relevant provisions of the law. It is inevitable that there may be loopholes in the legislation, and judges are obliged to fill them because they cannot refuse to adjudicate. Especially in the field of private law, when there are loopholes in the provisions of private law on social life among private persons, such as the infringement of general civil rights and interests that are not specified in the civil law, the recognition of the status of application of analogy can play an important role in the adjustment of social life and the protection of rights by law. Therefore, when the law expressly provides for the special type of security, it is not a bad choice to refer to the provisions of the security.

The reason for the first view is that Chinese law does not specify the term of suretyship of the counter-suretyship, so it is unfair to the surety to apply the six-month term of suretyship by analogy, and the longer three-year limitation period should be applied. This view is only supported by a minority, and there is no relevant case law to support it in practice. In fact, Article 387 of the Civil Code has already provided that counter-suretyship can be applied to the provisions of security. Counter-suretyship is only a different name, not a special security relationship, but also belongs to the essence of the legal relationship of security. The right of recovery is still essentially a claim, and it is not fundamentally different from the ordinary right of recovery from the debtor after the assumption of the suretyship liability. The purpose of the establishment of the term of suretyship, that is, to urge the right holder to exercise his rights in a timely manner, and in the counter-suretyship can also be applied. Therefore, the first point of view is not applicable.

Then, there is a view that the term of suretyship of the surety of the rules can be directly applicable to the counter-surety. The second view is based on this. The court in favor of this point of view in the judgment did not make too much reasoning, but directly invoke the rules of the term of suretyship [18]. However, this view is obviously unreasonable. As mentioned above, the counter-suretyship has certain complexity, the debt guaranteed by the counter-suretyship and the debt guaranteed by security are not the same debt, and mixing the term of suretyship of different debts up lacks jurisprudence.

2.4.2. Timing of the Determination of the Counter-Suretyship Obligation

As a result of the above arguments, the legal rules of security can be applied to the counter-suretyship, but in view of the complexity of the counter-suretyship obligation, the rules for the starting point of the term of general suretyship cannot be directly applied in the counter-suretyship. Therefore, the first and second viewpoints above are not admissible, while the third and fourth viewpoints above mainly differ in how and when the counter-suretyship obligation is determined. Clarifying this issue can determine the starting point of the term of suretyship of the counter-suretyship.

Under both views, it is recognized that a counter-suretyship is established on the basis of the surety's right to recover, and that there is a close connection between the counter-suretyship and the security. Specifically, the counter-suretyship is directed to the claim of the surety to recover from the counter-surety after the surety has assumed liability to the debtor, rather than to the principal claim.

One view is that when the counter-surety's debt is determined depends on whether the surety asserts his rights against the counter-surety during the term of suretyship. Based on Article 692, paragraph 3 of the Civil Code, which provides that the starting point of the term of suretyship is the date of expiration of the debtor's grace period for claiming his rights. Since the law stipulates that the term of suretyship cannot begin to run until the due date of the principal obligation, it is even more important that it should not begin to run when it has not yet been determined whether or not the principal debt has been incurred. "If the starting point of the term of suretyship is the date of actual payment by the surety, the surety's term of suretyship may end before it is determined

whether the principal debtor is liable or not, contrary to the foregoing jurisprudence and manifestly unfair to the creditor." [19] Therefore, the date on which the surety asserts his rights against the debtor or counter-surety should be taken as the starting point of the term of suretyship.

However, another viewpoint is that, in a counter-suretyship, the surety has already obtained the right to recover from the debtor from the date of satisfaction of the debt, and the debt has already been determined [20]. The surety can directly recover from the principal debtor, and at this time the debt of the counter-suretyship can also be determined, instead of having to wait for the surety to assert its claim against the counter-surety. It should also be noted that the surety of the counter-suretyship must be paid before it has a right of recovery against the counter-surety, rather than the debtor's failure to perform the obligation as it falls due or the circumstances agreed upon by the parties in the suretyship, which may require it to assume the suretyship liability.

The authors also agree with this view. According to the Interpretation of the Security System article 19, paragraph 1, even if the security contract is invalid, if the security provider claims liability from the counter-security provider after the security provider has actually assumed his liability, the court should support his claim. It can be seen that the criterion of "actual performance" is used here to determine whether the security provider has a right to realize a claim for recovery and also to determine whether the counter-security provider is actually liable to the security provider. "A security provider's recovery focuses on the satisfaction of his payment, not only on the principal debtor." Thus, when the security provider enjoys a right of recovery against the counter-security provider as a result of the counter-security contract and actually assumes the security liability, the counter-security provider's obligation to satisfy the security provider's claim for realization of the recovery arises immediately. At that time, the obligation of the counter-security provider becomes certain without the need to wait until the security provider asserts his claim against the counter-security provider.

In addition, Article 511 of the Civil Code provides for a "grace period" that when the period of performance is uncertain, giving the other party the necessary time to prepare. So the provision of a "grace period" only applies to debts for which the period of performance has not yet been determined. For the debt whose period of performance has been determined, there is no room for the application of it. Since the suretyship obligation has been determined from the date of the surety's actual assumption of liability, the term of suretyship should be started from this date. If the "grace period" provision were to apply to a counter-suretyship or if the term of suretyship were to begin to run according to the date on which the surety asserts his rights against the counter-surety, the term of suretyship system would be rendered null and void in a counter-suretyship, which could result in the term of suretyship beginning to run at a time that depends entirely on the surety. If the surety fails to assert his rights, the counter-surety is bound by the obligation at all times, which is detrimental to the stability of the legal relationship and contrary to the transaction efficiency. Under this rule, if the surety and the counter-surety do not agree on the starting point and time of the term of suretyship, but it is more favorable to the surety. This is obviously against common sense. Therefore, it is more reasonable to regard the starting point of the term of counter-suretyship as from the date when the surety actually assumes liability.

3. Effect of the Term of Suretyship Agreed by the Principal Contract

Article 692 of the Civil Code uniformly applies the statutory term of suretyship of six months in cases of "no agreement" and "unclear agreement". Previously, for the consideration of the principle of fairness, it was considered unfair to the creditor if the six-month statutory term of suretyship was applied under the circumstance of "unclear agreement". However, it was also unfair to the surety if there was no limit on the period of time [21]. And this kind of agreement is after all different from the "no agreement". So it was applied to the same length of time as the limitation period, i.e., two years' (which has now been changed to three years), which is also considered to be in line with the judicial policy of a specific period at that time. However, this legislative model inappropriately deprives the parties of their freedom of autonomy, which is inconsistent with the logic of Article 544 of the Civil Code, which stipulates that if the content of the contract is not changed explicitly, it is considered as unchanged [22]. And it also constructs a more complicated system of rules. Therefore, the Civil Code abandoned the previous "dichotomy" between "no agreement" and "unclear agreement" and turned to apply the statutory limitation period to both cases. Such a model not only to a certain extent simplifies the decision rules, improves judicial efficiency, but also avoids the abuse of discretion by some judges in practice, forcibly interpreting the situation which belongs to "no agreement" as "unclear agreement", prolonging the term of suretyship to the detriment of the surety's interests or resulting in the chaos of "different judgments for the same case".

However, in practice, the situation of "no agreement" or "unclear agreement" still need to be recognized in conjunction with judicial practice. For "no agreement" situation is relatively easy to determine and can be roughly divided into two situations. One is the parties in the suretyship contract did not mention the term of suretyship at all, the other is the law expressly provides for the "agreed term of suretyship earlier than the principal obligation or the principal obligation with the main period of time expires at the same time". The other is the case where the law expressly provides that "the agreed term of suretyship expires earlier than or at the same time as the due date of the principal obligation" is deemed not to have been agreed upon. There is still room for discussion on the determination of "unclear agreement" and the need to compulsorily apply the statutory term of suretyship when the it agreed upon by the parties is too long or too short.

3.1. "Unclear Agreement" as to the Term of Suretyship

For the case of "unclear agreement", the Civil Code does not make clear provisions, but Article 32 of the Interpretation of the Security System provides a corresponding explanation. It follows the previous " Interpretation of the Security Law " of the "enumeration + general clause" approach, providing that "Where a suretyship contract provides that the surety shall undertake suretyship liability until the principal of the principal debt and the interest thereon have been paid off, or when other similar stipulations are made, such stipulation shall be deemed as unclear, and the term of suretyship shall be six months from the date of maturity of the principal obligation. "

In practice, in addition to the Interpretation of the Security System, which expressly provides that the parties' express agreement in the suretyship contract "until clause" is a case of "unclear agreement". The authors also summarize the following typical types in practice: (1) did not expressly agree in writing on the term of suretyship, but from the content of the suretyship contract, it can be inferred that the agreement is "until the principal of the principal debt and the interest thereon have been paid off" clause [23]; (2) claimed that the term of suretyship had been agreed upon on the basis of standard terms on the period of performance [24]; (3) if the principal contract is delayed in its performance, the term of suretyship is delayed as well [25]; (4) Unclear language and lack of clarity as to the expiration date of the term of suretyship [26]; 5) Even if it is expressly made to exclude the mandatory term of suretyship provided for by law, the agreed term of suretyship is "until the principal of the principal debt and the interest thereon have been paid off " [27]. The clarification of the type of "unclear agreement" is enlightening for the future application of this provision.

However, it is still worth exploring the practice of treating "until clauses" as "unclear". The intention of the parties to agree on such provisions, may not be a blanket intention to replace the agreed term of suretyship through the right to call or the right to rescind and other rules, but through the agreement to strengthen the degree of liability of the surety [28]. And it is difficult to conclude from the text that the parties want to make the suretyship liability continues forever. And even if there is a similar provision, according to the rules of interpretation of the expression of intention, if the term of suretyship can be further precise, for example, "before the end of the project works", etc., it should be regarded as the agreement of the explicit term of suretyship, rather than applying the statutory term of suretyship.

3.2. Excessively Long or Short Agreed Term of Suretyship

From a superficial analysis of the provisions of the Civil Code, the parties are free to agree on the length of the term of suretyship, and the law has no right to interfere. However, in practice, when the agreed term of suretyship is shorter than the statutory term of suretyship or longer than the limitation period, whether it belongs to the "no agreement" or "unclear agreement" situation and thus must apply the statutory term of suretyship mandatorily, there are different practices.

3.2.1. Deny the Agreement of the Parties

3.2.1.1 Invalidity of the Agreed Term of Suretyship for Too Short

This view holds that the statutory term of suretyship is already the shortest period of time to give protection to the creditor, if shorter than that, it is not conducive to his interests. In practice, there are very few judicial decisions in favor of this view, in one case, the court held that the agreed twenty days of term of suretyship is too short, and it should be the six months [29]. Another court held that although in principle the short term of suretyship agreed upon by the parties should be respected, it should be limited to the extent that it does not violate the principles of honesty and good faith and public order and morality. In one case, the court pointed out in particular that "a one-day term of suretyship excessively restricts the creditor in exercising his rights, which violates the principle of honesty and good faith and the objective common sense. It is extremely unfair to the creditor, so the agreement should be regarded as no agreement." [30]

3.2.1.2 Partial/Full invalidity of the Agreed Term of Suretyship for too Long

The views believes that the agreed term of suretyship for too long is invalid is further divided into two. One holds that the agreed term of suretyship cannot exceed the statutory limitation period for the principal debt, otherwise the excessed portion is invalid, while the portion that not excesses is still valid. Some courts supported this view. A court pointed out that "the agreed term of suretyship more than two years (now the limitation period has been changed to three years) will lead to the principal obligation's limitation period had expired while the term of suretyship has not yet expired, resulting in the parties to exclude the result of the statutory limitation period by prior agreement. The plaintiff asked the defendant to assume the suretyship liability less than two years from the expiration of the principal obligation and the time did not exceed the effective term of suretyship of agreement." [31] The approach not only respect the party's autonomy, but also take into account the spirit of the statutory limitation period and avoid completely negating the agreement of the parties that may cause the creditor to miss the effective period of claiming rights of the unfavorable consequences.

Another point of view is that the agreed term of suretyship is longer than the statutory limitation period, which is contrary to the mandatory nature of the statutory limitation period and the original purpose of the term of suretyship, so it should directly apply the statutory term of suretyship. It argues that the essence of the agreement is that the parties had excluded the mandatory provisions of the law and the application of the term of suretyship by agreement, and it should therefore be invalid. Besides, based on the subordinate nature of the suretyship, it cannot exist at a time when the principal obligation has established a limitation period defense and can no longer be performed. This view was supported by the Supreme People's Court in the early stage and other district courts, "According to the provisions of the Security Law, the parties are allowed to agree on the term of the security liability on their own, but the maximum term should not exceed two years after the expiration of the principal obligation, mainly because the limitation period of the creditor claiming the right to the principal debtor is two years, so the term of the security liability should be subjected to the limitation period." [32]

3.2.2. Respect for the Parties' Agreement on the Length of the Term of Suretyship

The majority of views still believe that it should respect the parties' autonomy. In practice, some parties have argued that the term of suretyship is too short or too long thus it should be regarded as unagreed or unclear. However, such claims are not supported in most of the judgments. Most of the reasons are that "there is no factual or legal basis" and that "the agreement of the parties should be respected" [33].

The authors are also in favor of this view. First, the law does not explicitly make any limitations on the length of the term of suretyship. In the field of private law, it should maximize respect for the parties' autonomy. In the case of the parties have clearly agreed, the parties have made the balance of interests. The statutory term of suretyship should not have the effect of mandatory application and should not interfere in too much. Second, even if the parties agree on an excessively long term of suretyship, it may end up with shorter than or equal to the limitation period [34]. Because the

term of suretyship belongs to the scheduled period. It is not interrupted, suspended or extended by the occurrence of certain events, whereas the limitation period may be triggered by certain events that result in being longer than the three years prescribed by law. Third, although the suretyship obligation is subordinate, but it arises from the suretyship contract and is independent from the principal contract. If the principal obligation has exceeded the limitation period, the surety can invoke this basis to defense [35]. Besides, the defense of the limitation period is raised by the parties on their own initiative, the court has no obligation to find out. In the case of the agreement on the excessive term of suretyship, whether the surety will raise this defense is uncertain and the surety has the right to waive it. The law does not have to provide excessive protection for the surety.

However, the agreement of excessive long term of suretyship should not be permitted by law. The invalidity of the aforementioned "until clause" as violating the mandatory rule of law is the result of the consideration that if the term of suretyship is excessive long, it will be unfavorable to the surety too much. It would be paradoxically awkward if the law chose to uniformly respect the long term of suretyship agreed upon. Therefore, the basic principles of civil law should also be utilized to give certain boundaries to a long term of suretyship. Lastly, in the case of an agreement on an excessively short term of suretyship, some foreign legislation has directly set it at a shorter level, with the Italian and Swiss laws setting similar terms at two months and four weeks.

Therefore, as long as the term of suretyship is not excessively short or long, i.e., crossing the boundaries of "good faith" and "public order and morality", making it very difficult or even impossible for creditors to claim rights against the surety, the courts should respect the parties' agreement.

4. Conclusion

In summary, when the principal contract is an installment debt, the creditor can only claim suretyship liability from the surety when the last installment of the debt is due, and the term of suretyship should be started from that time. When problems arise in the course of the performance of the principal contract, for example, when the principal debtor is expected to default, it should be discussed on a case-by-case basis, depending on whether the creditor has a free choice or has chosen to assert early liability against the debtor. If he has done so, the term of suretyship should be advanced accordingly, and if he has not done so, it should be made in accordance with the provisions of the law. Another example, when the principal contract is rescinded, the starting point should be brought forward to the date on which the creditor can claim civil liability for the rescission of the principal contract. When a counter-surety exists, the starting point for the term of suretyship should be the date on which the surety actually performs his surety liability.

The courts should be careful to determine the effect of the agreed term of suretyship. For the "unclear agreement" on the term of suretyship situation, in practice, the parties may use various disguised reasons to defend themselves. The root of proper identification and judgment should be on the basis of the relevant provisions of the Civil Code and the Interpretation of the Security System. The parties' agreement on the term of suretyship must be so precise that it can be objectively determined. As for the parties' agreement of too long or too short terms, the judicial authorities should respect it when it does not exceed the boundaries of "good faith" and "public order and morality".

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