**Chapter Five**

**The Law of Obligations**

**Suggested answers to the review questions and case problems**

**1. What is an obligation?**

**Answer:** In the Civil and Commercial Code, the term “obligation” indicates a legal relationship whereby a person, called the debtor, is bound to render a performance in favor of another, called the creditor. The term encompasses both the duty of the debtor and the right of the creditor. This is a situation where a debtor is held liable to a creditor to perform a prestation consisting of “giving” something, “doing” something, or “refraining from doing” something at the risk of legal sanction. In other words, the creditor has the power to require from the debtor a thing or a performance which can be either a positive act or abstaining from some specified conduct. For example, obligations exist between seller and buyer, letter and hirer, lender and borrower, insurer and insured, employer and employee, wrongdoer and injured person.

**2. Define and illustrate the sources of an obligation.**

**Answer:** Several facts and acts are capable of producing obligations under the law. Such facts and acts are defined as sources of the obligation. Book II Obligations of the Civil and Commercial Code lists the sources of the obligations under different titles and in particular: Contract, Management of Affairs without Mandate, Undue Enrichment, and Torts.

This list is not closed. Thus, an obligation may originate in other facts or acts that are qualified to give rise to one in conformity with the legal system. For example, unilateral promises give rise to obligations only if the law expressly so provides, such as for the promise to give a reward under Section 362 of the Civil and Commercial Code. In other words, facts and acts have legal significance exclusively in the cases provided by the law. Notwithstanding the relatively distinct nature of these sources of obligations, they are listed together under the law of obligations on the basis that all are instances where the debtor is under a duty to carry out a certain performance toward the creditor.

**3. Describe the modes of performance of an obligation.**

**Answer:** According to the Civil and Commercial Code the creditor must actually be offered performance exactly as it is to be rendered (Section 208). The provisions of Sections 314 and following clarify the meaning of exact performance, whilst the effects of non-performance are governed by Sections 213 and following of the Civil and Commercial Code. In Thai civil and commercial law, an obligation is defined as a constraint. In order to ensure the realization of the obligation, the law provides the general requirements for performance. The execution of the prestation is instrumental to the satisfaction of an interest of the creditor. Correct prestation means that the object, subject, place, time, and manner of prestation must all be proper.

**4. Discuss the different cases of non-performance of obligations.**

**Answer:** Non-performance of obligations occurs when the subject of the obligation does not properly and completely perform a prestation consisting of “giving” something, “doing” something, or “refraining from doing” something. The failure to perform an obligation may be caused by several reasons. For example, if the depositary uses the property without the permission of the depositor, or the hirer unlawfully sublets the property hired, then these are considered non-performance.

In case of non-performance of obligations, the risk is charged to the debtor unless the debtor is exonerated from liability. According to Sections 213 and 214 of the Civil and Commercial Code, if a debtor fails to perform his obligation, the creditor has the right to demand forcible execution of the court, which takes different forms and shapes. This procedure is applied when the nature of the obligation is the payment of a sum of money or the delivery of a replaceable thing. In other cases, when the object of the obligation does not permit forcible execution, the creditor may apply to the court to have it done by a third person at the debtor’s expense. For example, the creditor may ask another plumber to fix the sink in his house since the first one never showed up.

**5. Distinguish penalty from deposit.**

**Answer:** Parties may voluntarily decide to provide a penalty as a security that the contract will be performed. A penalty for breach is something that is agreed in advance by the parties or provided by the law. If the debtor does not perform his obligation in the contract or does not perform it correctly, the penalty is forfeited or the debtor is requested to make payment of the penalty. A penalty must be handled according to the following principles: (1) the damages must be stipulated in advance; (2) the penalty must be a money amount or a performance of obligation; (3) if the penalty is a sum of money, the contractual parties have to specify the amount or the way to calculate it.

Similar to penalty is the concept of deposit. According to the Civil and Commercial Code, a party may voluntarily pay or may be required to pay deposit as indication that he has firmly decided to carry out the prospective deal. If, on entering into a contract, something is given as deposit, this serves as proof of the conclusion of the contract and as security that the contract will be performed (Section 377, Civil and Commercial Code). Deposit, however, is governed by different principles and in particular: (1) if the contract is performed, the deposit shall be returned or treated as part-payment upon performance; (2) if the party giving it fails to perform, the deposit shall be forfeited; (3) if the party receiving it fails to perform, the deposit shall be returned (Section 378, Civil and Commercial Code).

**6. Identify the principal modes to extinguish an obligation.**

**Answer:** The extinction of an obligation means that the relation between debtor and creditor has terminated because of a legal fact. Under the Civil and Commercial Code an obligation is extinguished in case of performance, deposit, release, set-off, novation and merger. *Performance* of an obligation represents a legal fact that terminates the obligation. When the debtor performs the obligation of giving something, doing something, or refraining from doing something, he has fulfilled his own duty and the legal relationship with the creditor is terminated.

*Deposit* is another means of termination of an obligation. It refers to the case where the creditor refuses the performance, is unable to accept the performance, or cannot be identified. In such cases, the debtor may be discharged from the obligation by depositing for the creditor’s benefit the thing forming the subject of the obligation (Section 331, Civil and Commercial Code).

An obligation will also terminate if the creditor declares to the debtor an intention to *release* the obligation. However, if the obligation has been evidenced by writing, the release must also be in writing or the document embodying the obligation be surrendered to the debtor or cancelled (Section 340, Civil and Commercial Code).

An obligation may terminate by means of *set-off*.Set-offrefers to the case where both parties are mutually bound to each other by obligations whose subject is of the same kind and both of which are due.

*Novation* is another means of termination of an obligation. It occurs when the parties concerned have concluded a contract changing the essential elements of the obligation (Section 349, paragraph 1, Civil and Commercial Code).

The extinction of an obligation may also result from *merger*. If rights and duties of one obligation are united in the same person, the obligation is terminated. The two subjects of the legal relationship have become one. Consequently, the obligation is extinguished.

The legal facts analyzed above, are only some of the many possible means of termination of an obligation. As a matter of fact, an obligation may terminate for other reasons, such as death of a party, dissolution of a juristic person, impossibility of the performance, decision of a court, and so on.

**7. What is suretyship? What is the formality of suretyship?**

**Answer:** A suretyship contract is a promise made by a third party, the surety, to be responsible for the debtor's obligation. Therefore, it is a personal security that can be given to assume an obligation as a co-debtor. A suretyship is given as security for the performance of a present, future, or conditional obligation provided it becomes effective at the time of the enforcement of the right of the creditor against the surety (Section 681, paragraph 2, Civil and Commercial Code).

A suretyship agreement does not require any particular formalities for its validity, though a creditor should always prefer to put it in writing in order to avoid any legal dispute regarding its terms and conditions. Besides, in case there is no written document signed by the surety, the suretyship contract is not enforceable.

**8. An international university in Hua Hin contracted with an American professor to deliver a lecture on “Natural Resource Management and Poverty Reduction” on January 22. On January 22, however, the American professor failed to show up for the lecture; she arrived two days later with the intention to give a lecture on that day. Can the University refuse to permit her to lecture the students?**

**Answer:** This is a case of non-performance of an obligation. Non-performance occurs when the subject of an obligation does not properly and completely perform a prestation consisting of “giving” something, “doing” something, or “refraining from doing” something. Since in the above scenario, the object of the contract can only be accomplished by performance at a fixed time and such time has passed, the University has the right to terminate the contract without any prior notice. Besides, the University may claim compensation for any damages caused thereby including the loss of money due on a contract, property repair, reduction in value of the property, or loss of advantages (Section 215, Civil and Commercial Code).

**9. On May 15, Arisa agrees to paint Noon’s villa in Ubon Ratchathani for 20,000 baht. The contract provides that Arisa must paint the villa with white color starting on May 25. On May 22, however, a strong hurricane hits Ubon Ratchathani and the villa collapses. If Arisa brings suit against Noon, what will be the most likely outcome?**

**Answer:** Where the performance becomes impossible by what is known as an “external cause,” that is, a tornado, a hurricane, a flood, a tremendous conflagration, or some other accident or disaster amounting to a public calamity, the obligation is discharged and the debtor is not liable. More precisely, according to Section 219 of the Civil and Commercial Code, the debtor is relieved from his obligation to perform if the performance becomes impossible for causes not imputable to him, occurring after the creation of the obligation. In the above scenario, the performance becomes impossible because of a strong hurricane that hit Ubon Ratchathani city. Consequently, Noon is not liable and the obligation to pay 20,000 baht is discharged.

**10. Suppaluk sells to Am a car for 300,000 baht payable in monthly installments of 10,000 baht for 30 months. Beam signs a suretyship contract to guarantee the payment of the debt. Suppose that after Am has made the first five monthly payments he moves to a new city and sells the car for 200,000 baht. What are Suppaluk’s rights, if Am defaults on the debt?**

**Answer:** A suretyship contract is a promise made by a third party, the surety, to be responsible for the debtor's obligation. Therefore, it is a personal security that can be given to assume an obligation as a co-debtor. Section 680 of the Civil and Commercial Code defines suretyship as an express contract under which the surety binds himself to a creditor to satisfy an obligation in the event that the principal debtor fails to perform it. In the above scenario, a suretyship is given to guarantee the payment of Am’s debt of 300,000 baht. In case Am is unable or unwilling to pay, then Suppaluk has an immediate and direct remedy against Beam. Specifically, the Civil and Commercial Code states that the creditor must demand performance of the obligation of the debtor first and must proceed against the property of the debtor before holding the surety responsible for payment (Sections 688 and 689, Civil and Commercial Code).