

## Items to be discussed for the Civil Code (law of obligations) reform (3)

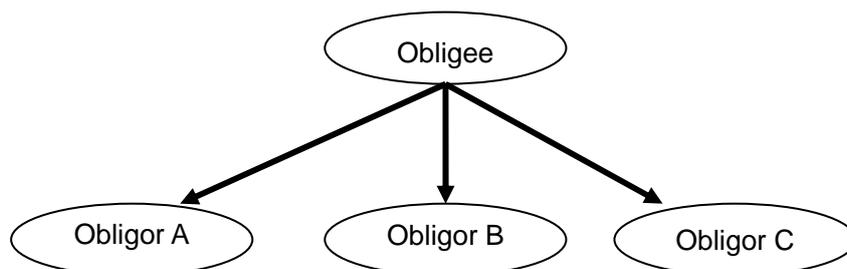
### Part I. Claims and Obligations of Multiple Parties (excluding guarantee obligation)

[Note] While Book III-Chapter 1-Section 3 of the current Civil Code (Claims and obligations of multiple parties) stipulates provisions on the guarantee obligations in Section 4, the guarantee obligations are different from divisible obligations, joint and several obligations, and indivisible obligations, in which multiple obligors owe the same obligation, to the point that a guarantee obligation is an obligation to perform the obligation of other person (principal obligation) in terms of formality. In addition, they have original meaning to the point that they are specialized in the function of security. Accordingly, the guarantee obligation is discussed in “Part II. Guarantee Obligations” independently, and “Part I. Claims and Obligations of Multiple Parties” deals with the rest of claims and obligations of multiple parties.

#### 1. General discussion

The current Civil Code stipulates divisible claims and divisible obligations (Art.427), indivisible claims and indivisible obligations (Art. 428 to 431), and joint and several obligations (Art. 432 to 445) with regard to claims and obligations of multiple parties (claims and obligations relations where one side or both sides are multiple parties). While there is a view that joint and several claims should be newly established in addition to the existing concepts regulating claims and obligations relations of multiple parties (see, 3 (3)), what else should we consider in discussing creation of a new concept or abolishment of existing concepts? In addition, what kind of points should we pay attention in reviewing provisions on claims and obligations relations of multiple parties?

#### 2. In cases of multiple obligors



## (1) Divisible obligations

Article 427 of the current Civil Code provides on divisible obligations that each obligor has the equally proportionate obligations unless any other intention is manifested. However, it is understood that this provision regulates the external relations (the relation with the obligee), not the internal relations (the relation among obligors). Namely, for example, even when there is an agreement of unequal proportion of obligation among obligors, if that effect is not expressly manifested to the obligee, the obligation of each obligor against the obligee becomes divisible obligations based on equal proportion. It is pointed out, however, that this effect is not necessarily clear from the language of the article. Accordingly, there is an idea that this should be clearly stated in the article.

## (2) Joint and several obligations

### A. Requirements

The current Civil Code stipulates an article starting “If more than one person bears a joint and several obligation” (Art.432) only and does not clearly state requirements for joint and several obligations. In general, it is understood that a joint and several obligation is formed not only through provision of law but also based on manifestation of intent of related parties. Accordingly, there is a view that this effect should be clearly stated in law.

### (Related issues) Generalization of Article 511 (1) of the Commercial Code

Article 511 (1) of the Commercial Code provides “When several persons owe an obligation through a commercial transaction for one of these persons or all, each person owes the obligation jointly and severally.” While the Civil Code requires express or implicit manifestation of intent of making the obligation joint and several, Article 511 (1) of the Commercial Code establishes a special provision for occasions where several persons owe an obligation through single commercial transaction from the viewpoint of securing safety of commercial transaction.

There is an opinion that provision of Article 511 (1) of the Commercial Code should be a general rule for civil law because the necessity of securing safety of commercial transaction is applicable not only to commercial transaction but also to general civil transaction. If this view is adopted, the occasions that joint and several obligations are formed are not limited to when several persons owe an obligation through single commercial transaction. They will be widely formed when several persons owe an obligation through single transaction.

### B. Effects of circumstances accruing to one of joint and several obligors

While the current Civil Code adopts the principle of relative effect as a general rule as to whether the effects of circumstances accruing to one of joint and several

obligors reach the rest of obligors (CC Art. 440), it provides absolute effects for many circumstances (CC Art. 434 to Art.439).

Among such circumstances, there is no objection as to granting absolute effects for setoff (CC Art. 436 (1)) and merger (CC Art. 438). In addition, there is an opinion proposed that there is no necessity to substantially reform the contents of current law as to the rest of circumstances.

On the other hand, it is pointed out that while joint and several obligations have the function of personal security through dispersing the risk of insolvency of an obligor, it is against intention of general obligees that there are many occasions which create absolute effects and accordingly weakens the function of security of joint and several obligations. In addition, case law and theories interpret that a part of provisions on circumstances causing absolute effects is not applicable to the obligation to pay damages which joint tortfeasors owe (CC Art. 719) even though it is also regarded as joint and several liability under the law.

Based on these discussions, how should we consider the necessity to review circumstances causing absolute effects under the current law?

[Note] In the following, we discuss among the circumstances causing absolute effects under the current law, request for performance (CC Art. 434), release of an obligation (CC Art. 437), novation (CC Art. 435), and completion of prescription (CC Art. 439) individually (below (a) to (d)). The purpose of this discussion is to take an overall view of the system design if we adopt a view that the circumstances causing absolute effects should be reduced, in order for the reference of the discussion on the necessity to review the circumstances causing absolute effects under the current law.

In addition, we discuss invocation of the right to setoff by other joint and several obligors (CC Art. 436 (2)) and commencement of bankruptcy procedures (CC Art. 441) in this section because they have the common aspects with the above issues with respect to treatment of a circumstance accruing to one of joint and several obligors (below (e) and (f)).

#### (a) Request for performance (CC Art. 434)

Article 434 of the current Civil Code provides absolute effects with respect to a request for performance made to one of joint and several obligors. While this provision is advantageous to the obligee because it functions to the direction to strengthening the security function of joint and several obligations, it is also pointed that there is a thread to give unexpected damage to joint and several obligors who did not receive such request. Accordingly, several views are proposed such as a view that a request of performance should not cause absolute effects or a view that the occasions that cause absolute effects should be limited.

(b) Release of an obligation (CC Art. 437)

Article 437 of the current Civil Code provides that a release of an obligation effected for one joint and several obligor is also effective for the benefit of other joint and several obligors to the extent of the portion of the obligation which is borne by such joint and several obligor. A view is proposed that this is against intent of general obligees who releases an obligation of one of joint and several obligors and therefore the effect of such release should be only relative (in order to effectuate absolute effects as to the portion of the obligation of other obligors, the obligee can release these obligations vis-à-vis other obligors).

(c) Novation (CC Art. 435)

Article 435 of the current Civil Code provides that if there is any novation between one joint and several obligor and the obligee, the claim shall be extinguished for the benefit of all joint and several obligors. A view is proposed that this is against intent of general obligees who make novation with one of joint and several obligors and therefore the effect of such novation should be only relative.

(d) Completion of prescription (CC Art. 439)

Article 439 of the current Civil Code provides that if the prescription is completed with respect to one joint and several obligor, that effect is absolute to the extent of the portion of the obligation borne by other joint and several obligors. There is a view that, from the viewpoint to decrease circumstances causing absolute effects functioning to the direction weakening the security function of joint and several obligations, the effect of completion of prescription for one joint and several obligor should be relative. Even if we stand for such point of view, however, there arises a problem with respect to the purpose of the prescription system if we would make a new rule that allows the rest of joint and several obligors who have made payment thereafter to claim reimbursement against the obligor who enjoys completion of the prescription. Accordingly, there is necessity to consider whether this claim for reimbursement should be restricted (the effect of completion of prescription reaches the rest of joint and several obligors to that extent).

(e) Invocation of the right of setoff by other joint and several obligors (CC Art. 436 (2))

The case law states that based on Article 436 (2) of the Civil Code a joint and several obligor can manifest intention of setoff employing a claim which is possessed by another joint and several obligor. However, it is pointed that this conclusion is inappropriate because it means that among joint and several obligors everyone can dispose other person's claims. A widely-accepted theory explains that Article 436 (2) means that the rest of joint and several obligors can refuse payment to the extent of

the obligation which is owed by the joint and several obligor who has the right of setoff. In addition, a view is proposed with respect to provision of this paragraph that even if this paragraph is understood based on the widely-accepted theory, this paragraph still lacks reasonableness and therefore should be abolished.

Based on these discussions, to which direction should we advance review as to regulation of occasions where a joint and several obligor who possesses a claim vis-à-vis the obligee does not invoke the right of setoff.

(f) Commencement of bankruptcy procedures (CC Art. 441)

Article 441 of the current Civil Code provides that when some or all joint and several obligors have become subject to the ruling of the commencement of bankruptcy procedures, the obligee may participate in the distribution of each bankruptcy estate with respect to the entire amount of his or her claim. However, the purpose of this regulation is to achieve fairness among obligees under bankruptcy procedures and this is not a regulation which should be necessarily stipulated in the Civil Code. In addition, Article 104 (1) of the Bankruptcy Act provides participation to bankruptcy procedures where there are several persons who owe the duty to perform entire obligations, and there is no occasion where Article 441 of the Civil Code is applied in practice. Accordingly, there is a view that Article 441 of the Civil Code should be deleted.

C. Reimbursement

While the current Civil Code provides reimbursement issues among joint and several obligors from Article 442 to 445, what kind of point should we consider in reviewing these provisions?

(a) Reimbursement in case of partial performance (CC Art. 442 (1))

While Article 442 of the current Civil Code stipulates reimbursement when “one joint and several obligor performs the obligation, or has otherwise acquired any common discharge in exchange for his/her own property,” this provision is not necessarily clear about the relation of reimbursement in cases where one joint and several obligor makes partial performance. Especially, there is a discussion on whether occurrence of the right of reimbursement requires performance which is more than the obligation that the joint and several obligor owes.

The case law explains that even when one joint and several obligor makes performance which is less than the obligation that the joint and several obligor owes, that joint and several obligor has the right of reimbursement vis-à-vis other joint and several obligors corresponding to respective proportion of their obligations. Accordingly, there is a view that this effect should be stipulated in the text of the law.

(Related issues) Reimbursement in cases of substitute performance or novation

While Article 442 of the current Civil Code stipulates reimbursement when “one joint and several obligor performs the obligation, or has otherwise acquired any common discharge in exchange for his/her own property,” this provision is not necessarily clear about reimbursement in cases where one joint and several obligor performs an obligation through substitute performance or an obligation after novation. It is generally accepted that a joint and several obligor under such circumstances can claim reimbursement only to the amount of common discharge vis-à-vis other joint and several obligors when the amount of performance exceeds the amount of common discharge, and on the other hand, a joint and several obligor can claim reimbursement vis-à-vis other joint and several obligors to the extent of respective proportion of their obligations based on the amount of performance when the amount of performance is less than the amount of common discharge.

Accordingly, there is a view that it should be clearly stated in the text of the law that a joint and several obligor who has performed an obligation through substitute performance or an obligation after novation can claim reimbursement vis-à-vis other joint and several obligors to the extent of the amount which he or she performed based on proportion of obligations which respective joint and several obligors owe.

(b) Limitation of reimbursement of joint and several obligors who have failed to give notice (CC Art. 443)

The purpose of Article 443 (1) of the current Civil Code is to oblige a joint and several obligor who seeks to exercise the right of reimbursement to give advance notice to other joint and several obligors. However, there is a criticism on this provision that it is inappropriate to impose such duty on the joint and several obligor because he or she is in the status that one has to make payment immediately after the due date has come. Accordingly, we may have to review this provision. What kind of points should we consider in reviewing this provision? Do we need to consider any treatment if we abolish the obligation of advance notice?

(Related issues) Recognition of existence of other joint and several obligors

It is also pointed that it is too severe to require advance notice when the joint and several obligor cannot know existence of other joint and several obligors. While it is rather an exceptional case that the relationship of joint and several obligation is formed but the joint and several obligor cannot know other joint and several obligors, such case may be happened among joint tortfeasors. It is possible to deliberate the law in the direction that advance notice is not obliged under such situation.

(c) Reimbursement in cases where an obligor does not have the sufficient final resources (CC Art. 444)

Article 444 of the current Civil Code provides that “If there is any person among the joint and several obligors who does not have the sufficient financial resources to make the reimbursement, the portion that cannot be reimbursed shall be borne among the person who demands the reimbursement and other persons who have the financial resources, in proportion to the respective portion which is borne by each of such persons.” However, it is unclear from this provision that how to treat the cases where all joint and several obligors who bear some obligations do not have sufficient financial resources.

Case law states that, when all obligors who bear some obligations do not have sufficient resources, if one of such obligors has made payment, the obligor seeking reimbursement and other obligors should equally share the burden. Accordingly, there is a view that this should be clearly stated in the letter of the law.

(d) Release from joint and several obligations(CC Art. 445)

Article 445 of the current Civil Code provides that in cases any one joint and several obligor is released from the joint and several obligation, if there is any person among other joint and several obligors who does not have the sufficient financial resources to pay the obligation, the obligee shall bear such portion of the obligation which may not be performed by such person without sufficient financial resources as should have been borne by the person who was released from the joint and several obligation.

(3) Indivisible obligations

Under the current Civil Code, there are two kinds of indivisible obligations: indivisible obligation by its nature; and indivisible obligation due to manifestation of intension of the parties involved (see, Art.428). Thus, an obligation of divisible payment can be made indivisible or joint and several obligations through manifestation of intension. Parties consider these two options because they have different legal effects; a joint and several obligation involve many causes that generate absolute effects whereas an indivisible obligation does not (CC Art.430).

If we reach the conclusion that causes generating absolute effects under joint and several obligations should be reduced as a result of deliberation under above (2)(b), the difference between indivisible obligations and joint and several obligations may become little. If such situation occurs, it is possible to adjust the relationship of both obligations in a way that the purpose of indivisible obligations is indivisible payment only (indivisible obligation by its nature), and the purpose of joint and several obligations is divisible payment only.

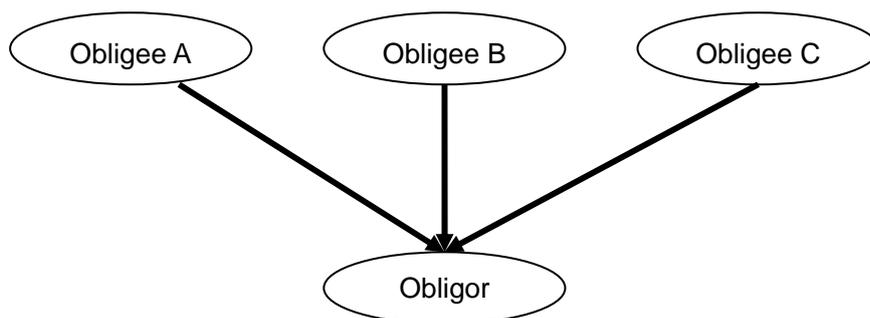
(Related issues) Making indivisible obligations divisible (CC Art. 431)

Article 431 of the current Civil Code provides that if any indivisible obligation becomes a divisible obligation, each obligor shall bear his/her responsibility only to the extent of the portion of the obligation which he/she bears. It is explained that it is natural that an indivisible obligation becomes a divisible obligation once it becomes divisible because the concept of indivisible obligation is a special concept created due to its invisibility.

On the other hand, it is pointed that it may be contrary to the intension of the parties (especially, the intension of the obligee who has valued the effect of guarantee for an indivisible obligation) when an indivisible obligation always becomes a divisible obligation once the purpose of the claim becomes divisible.

Accordingly, there is a view that it should be allowed when there is a contrary special term among the parties on an indivisible obligation, if the purpose of the claim becomes divisible, the indivisible obligation becomes not a divisible obligation but a joint and several obligation. This issue also closely relates to the conclusion of the deliberation on above-stated (2) (b).

## 2. In cases of multiple obligees



### (1) Divisible claims

Article 427 of the current Civil Code provides on divisible claims that unless any other intention is manifested, each obligee shall have the equally proportionate rights. It is understood that this provision regulates the external relations (the relation with the obligor), not the internal relations (the relation among obligees). Namely, for example, even when there is an agreement of unequal proportion of claim among obligees, if that effect is not expressly manifested to the obligor, the claim of each obligee against the obligor becomes divisible claims based on equal proportion. It is pointed out, however, that this effect is not necessarily clear from the language of the article. Accordingly, there is an idea that this should be clearly stated in the language of the law.

### (2) Indivisible claims – effect of circumstances which arises with respect to one of indivisible obligees (CC Art.429(1))

Article 429 (1) of the current Civil Code provides that even in cases where there is a novation or release between one indivisible obligee and the obligor, other indivisible

obligees may request the obligor to tender the entire performance, however, the benefit which would have been allocated to the abovementioned one indivisible obligee if he/she did not lose his/her right must be reimbursed to the obligor. There is a view that this provision is applied to not only the cases of a novation or release but also the cases of merger or substitute performance. Based on such view, it is possible to consider whether Article 429 (1) is applicable to the cases where there is a merger or substitute performance between one indivisible obligee and the obligor.

### (3) Joint and severable claims

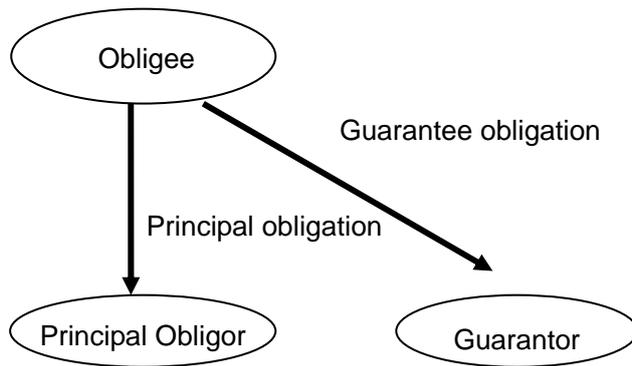
The current Civil Code regulates the relationship of claims and obligations where there are multiple obligees through provisions of divisible claims (Art.427), and indivisible claims (Art.428, 429 and 431) only. However, there is a view which recognizes the concept of joint and severable claims as to the rights of the principal and the agent vis-à-vis the sub-agent (Art.107(2)) and the rights of the lessor and the lessee vis-à-vis the sub-lessee (Art. 613). There is an idea that a new provision should be established as to joint and severable claims.

On the premise that the causes generating absolute effects under joint and several obligations are reduced, if whether an obligation is an indivisible obligation or a joint and several obligation is decided according to the purpose of the claim is indivisible payment or divisible payment (see 2 (3)), it is logically consistent to adjust the relationship of claims and obligations where there are multiple obligees by distinguishing indivisible claims from joint and several claims based on whether the purpose of the claim is indivisible or divisible.

### (Related issues) Making indivisible claims divisible

Article 431 of the current Civil Code provides that if any indivisible claim becomes a divisible claim, each obligee may request the performance only to the extent of such portion of the claim on which he/she has his/her own right. If our deliberation concludes that an indivisible obligation becomes a joint and several obligation, not a divisible obligation, upon the purpose of the claim changes from indivisible payment to divisible payment when there is a special agreement among the parties (see 2(3) (Related issues)), it is logically consistent to allow indivisible claims to become joint and several claims, not divisible claims, upon the purpose of the claim changes from indivisible to divisible with such an agreement.

## Part II. Guarantee Obligations



### 1. General discussion

Guarantee has great significance in practice as a measure for an obligor who does not have property for real security such as immovable property to supplement his or her own credibility. However, there is no end to the number of cases where an individual guarantor has been requested performance of a guarantee obligation which is unexpectedly high amount and been pushed into a ruptured life. For example, it is pointed that the system of joint and several guarantees should be abolished because it is one major factor of suicide.

The Civil Code Reform in 2004 reformed the rules of guarantees from the viewpoint of protecting guarantors through ensuring appropriateness of the content of guarantee contracts. However, there is an opinion to request further expansion of guarantee protection recognizing the above-stated circumstances. Based on such situation, what kind of points should we consider in reviewing provisions on guarantees?

### 2. Formation of guarantee obligation

(1) Formation of guarantee obligation through a contract between an obligor and a guarantor

While under the current Civil Code it is necessary to conclude a guarantee contract between the obligee and the guarantor in order to form a guarantee obligation, in practice it is stated that there are many cases where the obligor entrusts the guarantor with guaranteeing his or her obligation and the obligor and the guarantor forms a guarantee entrust contract before concluding a guarantee contract.

In addition, it is understood that overlapped (cumulated) assumption of obligations, which has the nature of personal security similar to guarantees, is formed through a contract between the obligor and the person assuming the obligation as a contract for a third party (Article 537).

Based on such circumstance, there is a view that we should allow formation of a guarantee obligation through a contract between the obligor and the guarantor

(guarantee assumption contract).

## (2) Measures to protect guarantors in concluding a guarantee contract

Upon the 2004 reform of the Civil Code a new provision was established stating that no contract of guarantee shall be effective unless it is made in writing (Art.446 (2)). This provision was stipulated based on an understanding that it is appropriate to make a guarantee contract legally binding only when the intention of guarantee is clear from the outside in order to make the involved parties careful in concluding a guarantee contract.

As to the measures to protect guarantors in concluding a guarantee contract, there are opinions, from the viewpoint to expand such measures, to impose an obligation on the guarantee to give the guarantor explanation which is sufficient for the guarantor to understand the meaning of guarantee, or to provide information on financial condition of the principal obligor to the guarantor. Taking account of these proposals, how should we consider the measures to protect guarantors in concluding a guarantee contract?

(Related issues) How protection of guarantors should be after concluding a guarantee contract?

There are various proposals as a measure to protect guarantors after concluding a guarantee contract. Examples are a proposal to impose on the obligee an obligation to give notice to the guarantor about the condition of payment by the principal obligor, or a proposal that when the principal obligor who obtains an agreement on an installment plan loses the benefit of time, the guarantor should be given an opportunity to maintain the benefit of time.

### **3. Appurtenant nature of guarantee obligations (CC. Art. 448)**

Article 448 of the current Civil Code provides on so-called appurtenant nature of the content of guarantee obligations that “if the burden of a guarantor is more onerous than that of the principal obligor as to either its subject or its terms, it shall be reduced to the extent of the principal obligation.” However, there is no clear provision about the treatment in cases where the content of the principal obligation has accumulated after conclusion of the guarantee contract. While it is understood that even if the content of the principal obligation is accumulated after conclusion of the guarantee contract, there arises no effect over the guarantee obligation, there is a view that this should be clearly stated in the letter of the law.

(Related issues) Clear provision on the appurtenant nature and the supplement nature

As to the nature of guarantee obligations, while there are Article 448 on its appurtenant nature of the content of guarantee obligations and Article 452 and 453 on its supplement

nature, many are left to interpretation in fact. There is a proposal to establish clear provisions on the appurtenant nature and the supplement nature among the proposals for the Civil Code reform.

#### **4. Defenses of guarantors**

(1) Defenses which is inherent in guarantors – defenses of demand and reference

##### **A. Necessity of the defense of demand (CC Art.452)**

Article 452 of the current Civil Code provides that when an obligee has demanded performance of an obligation from the guarantor, the guarantor can demand the obligee to demand performance of the principal obligor first (the defense of demand). There is a view that the defense of demand should be abolished because it is impractical as a system to protect guarantors. On the other hand, there is another view that existing situation should not be changed in the direction retreating protection of guarantees.

##### **B. Effect of the defenses of demand and reference (CC Art. 455)**

Article 455 of the current Civil Code provides that if the obligee, who was exercised the defense of demand or reference, fails to demand or to levy execution and is subsequently unable to obtain full performance from the principal obligor, the guarantor is relieved of liability to the extent that the obligee would have received performance if the obligee had immediately demanded or levied execution. The intent of this article is that a guarantor should be exempted from the liability to the extent that the decrease of performance caused by the failure of the obligee.

There is an opinion that this intent should be expanded and the article should be revised so that it applies generally to the cases where performance from the principal obligor is decreased because the obligee failed to timely levy execution against the property of the principal obligor.

(2) Defenses based on circumstances arises with the principal obligor (Art.457)

Article 457 of the current Civil Code provides that a guarantor may raise a defense vis-à-vis the obligee by setting off any claim which the principal obligor may have vis-à-vis the obligee.

While there is a view that this article allows a guarantor to manifest intent of set-off using the claims which the principal obligor possesses, it is generally understood that this article only allows a guarantor to refuse performance to the extent the principal obligation is extinguished through set-off because it is excessive to allow a guarantor to dispose claims of the principal obligor who is independent from the guarantor.

Accordingly, there is a view that, based on this general understanding, it should be clearly stated in the text of law that a guarantor is able only to refuse performance to

the extent the principal obligation is extinguished through set-off.

(Related issues) Other defenses that the principal obligor obtains

The current Civil Code sets forth a provision only on cases where the principal obligor has the right of set-off vis-à-vis the obligee (Art. 457 (2)). Where the principal obligor has other kinds of defenses is left to interpretation in fact.

It is understood that a guarantor can employ defenses that the principal obligor possesses based on the appurtenant nature of the guarantee obligation, and if the principal obligor has the right to rescind or the right to cancel, the guarantor can refuse performance of the guarantee obligation until it is determined whether such right is exercised.

In addition, while partners of a membership company is in the similar status with a guarantor in terms that they are liable for the performance of the obligations of the membership company in certain cases (Article 580, the Company Act), Article 581 (1) of the Company Act provides that the partners may assert defenses against creditors of such membership company that the membership company may raise against such creditors. Article 581 (2) of the Act also provides that, if the membership company has the right to rescind or right to cancel against its creditors, the partners may refuse the performance of obligations to such creditors. Accordingly, there is a view that the preceding interpretation should be clearly stated in the text of law based on these provisions.

## **5. Guarantors' right to obtain reimbursement**

(1) The right to obtain reimbursement of an entrusted guarantor (CC Article 459)

Article 459 (1) of the current Civil Code provides on the right to obtain reimbursement afterward in cases where an entrusted guarantor extinguishes the principal obligation such as by performing the obligation. There is a view that, where an entrusted guarantor extinguishes the principal obligation through performance before the due date, it is enough to treat such guarantor through a provision of the right to obtain reimbursement afterward of a guarantor not entrusted (CC Article 462 (1)) because the conduct of such guarantor involves something different from the purpose of entrustment.

(2) The right to obtain reimbursement in advance of an entrusted guarantor (CC Article 460, 461)

Article 460 of the current Civil Code provides that an entrusted guarantor may exercise the right to obtain reimbursement in advance vis-à-vis the principal obligor. There is an opinion that, if Article 455 of the current Civil Code is revised so that it generally covers the cases where the amount of payment from the principal obligor has decreased because the obligee fails to levy execution timely (see, aforesaid 4 (1)), there is no necessity to grant an entrusted guarantor the right to obtain reimbursement

in advance.

(3) The duty to give notice of an entrusted guarantor (CC Article 463)

Article 463 (1) of the current Civil Code applies Article 443, which provides on the duty to give notice in advance/afterward of a joint and several obligor who purports to exercise the right to obtain reimbursement, *mutatis mutandis* to a guarantor. As to the provision of Article 443, it is discussed whether the duty to give notice in advance should be abolished because it is inappropriate to impose the duty to give notice in advance on a joint and several obligor who is in the position in which a person has to perform the obligation immediately after the due date has come (see, aforesaid Part I, 2 (2) c (b)). We may need to consider whether the duty to give notice in advance of an entrusted guarantor should be abolished because the reason argued on abolishment of such duty of a joint and several obligor is applicable to an entrusted guarantor.

(4) The duty to notice of a guarantor not entrusted (CC Article 463)

Article 463 (1) of the current Civil Code applies Article 443, which provides on the duty to give notice in advance/afterward of a joint and several obligor who purports to exercise the right to obtain reimbursement, *mutatis mutandis* to a guarantor. The purpose of imposing such duty is to give the principal obligor who has defenses *vis-à-vis* the obligee a chance to assert such defenses. However, the scope of the right to obtain reimbursement of a guarantor not entrusted is limited to “the extent the principal obligor was enriched at the time of such performance of the obligation” (Article 462 (1)) or “the extent the principal obligor is actually enriched” (Article 462 (2)), and if the principal obligor has defenses against the obligee, performance for such obligation is excluded from “the extent the principal obligor is actually enriched” and thus the significance of the duty to give notice in advance is little. Accordingly, there is a view that the duty to give notice in advance of a guarantor not entrusted should be abolished.

## **6. Joint guarantee**

Article 456 of the current Civil Code provides that where there are more than two guarantors owe a guarantee obligation (joint guarantee), each joint guarantor owes equally proportionate guarantee obligation only (interests of divisibility) as a general rule. However, a problem is pointed that, while the obligee enters into a joint guarantee contract expecting that such guarantee strengthens the effect of guarantee, this provision would rather weakens the security function of guarantee because the obligee becomes unable to request one joint guarantor to perform all obligation and further, if there is an insolvent party among joint guarantors, the obligee loses the

security for the part of that party. Accordingly, there is a view that the interest of divisibility should not be granted to joint guarantors and, where there are multiple guarantors, each joint guarantor should guarantee all amount of the obligation (guaranteeing jointly and severally). On the other hand, there is another view that current practice should not be changed into the direction to retreating protection of guarantors.

## **7. Joint and several guarantee**

(1) How the system of joint and several guarantee should be

Joint and several guarantors are in a position which is more disadvantageous than general guarantors considering the points that it is understood that they do not have the defenses of demand and reference, and the interest of divisibility. There is an opinion that the fact that such system of joint and several guarantee exists itself is problematic from the viewpoint of protection of guarantors.

While it is stated that in actual transactions most of cases where a guarantee is used are actually the cases of joint and several guarantees, considering such opinion, how should we review the system?

(2) Effect of circumstances which arises with respect to the jointly and severally liable guarantor

Article 458 of the current Civil Code applies Articles 434-440, which provide on effects of circumstances that arose with respect to one of joint and several obligors, *mutatis mutandis* to the effects of circumstances which arose with respect to a joint and several guarantor. However, it is understood that it is only Article 434 providing an absolute effect of request for performance which has practical significance of application because, different from joint and several obligors, joint and several guarantors do not share a responsible part with respect to the principal obligation. However, there is a criticism that the rule that the effect of request for performance to a joint and several guarantor reaches the principal obligor (CC Art.458, 434) is inappropriate because this means that the principal obligor suffers a disadvantage through a joint and several guarantee contract in which the principal obligor does not participate.

## **8. Revolving guarantee**

2004 revision of the Civil Code reformed on revolving guarantee, limiting the scope of its principal obligation to those contracts (contract for revolving guarantee for loans) involving an obligation which is incurred as a result of the transaction of lending money or accepting discount of a negotiable instrument (such as loan obligation), and stipulated new provisions protecting a guarantor from assuming unexpectedly

excessive responsibility (CC. Article 465-2 to 465-5).

There is a view that, from the aspect of further promoting protection of guarantors, the provisions stipulated by 2004 revision should cover revolving guarantee not involving loan obligation in the scope of its principal obligation. There is another view that so-called the right of special cancellation should be clearly stated in the text of law.