

Legal changes affect guarantors' rights and obligations

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Guarantors are subject to a number of important obligations under Thai law. A guarantor can be held jointly liable with a debtor, or worse, solely and entirely liable as a primary debtor. In addition, creditors often use their higher bargaining power to force guarantors to waive their rights as secondary debtors, meaning that certain fundamental rights, such as the requirement for creditors to first call on debtors, are no longer enforceable.

The main forms of security available under the Thai Civil and Commercial Code are: mortgage, pledge, and guarantee (suretyship), corporate or personal.

Thailand, however, does not provide for many of the security rights, such as liens and charges, that are available in common-law countries. Therefore, creditors often elect to use guarantees — both corporate and personal — instead of security interests. Consequently, guarantors are tremendously important to creditors and they are frequently called on.

Despite their popularity, guarantors are not afforded an adequate level of protection. The Supreme Court has ruled that an agreement that is contrary to a guarantee provision, such as an agreement that requires a guarantor to be liable as a joint debtor, is enforceable. An act is not void if it differs from a provision of any law, it said, as long as the law in question does not relate to public order or good morals under Section 151 of the Civil and Commercial Code.

Therefore, as guarantee laws do not relate to public order or good morals, exemptions are permitted. The result is that guarantors can be forced to sign agreements that are contrary to the general provisions of guarantee laws — provisions that are intended to protect guarantors' rights as secondary debtors.

In a sign that things could change for guarantors, new amendments to the guarantee and mortgage provisions of the Civil and Commercial Code will soon come into effect. This includes the Civil and Commercial Code Amendment Act (No.20) BE 2557 (Amendment No.20), which became effective on Feb 11, 2015, and another recent draft amendment (New Amendment) approved by the National Legislative Assembly on May 14 and currently pending publication in the Government Gazette.

Amendment No. 20 aims to provide greater protection of rights and fair treatment to guarantors who are not primary debtors. However, local lenders have expressed discontent with the amendment because it offers the same level of protection to individual and corporate guarantors. In response to the outcry, the New Amendment will change the provisions that relate to guarantors and mortgagors who are juristic persons, financial institutions or in the business of providing guarantees for remuneration.

Some of the most significant changes introduced by both amendments relate to corporate guarantors. Under Amendment No. 20, Section 681/1 has been added to the Civil and Commercial Code, which provides that:

"Any agreement which specifies that a guarantor must be liable in the same manner as that of a joint debtor or in the capacity of a joint debtor shall be void."

The New Amendment added a second paragraph to Section 681/1, as follows:

"The above provision is not applicable to a guarantor who is a juristic person and who has consented to be bound in the same manner as that of a joint debtor, or in the capacity of a joint debtor. In such case, a guarantor who is a juristic person shall have no rights as provided in Sections 688, 689 and 690."

Under these provisions, guarantors who are juristic persons and who have consented to be bound as a joint debtor can still be held jointly liable with debtors. In such a case, they have no rights as secondary debtors to request and require lenders to demand and call on debts from debtors first. These are rights provided under Sections 688, 689 and 690 of the Code.

In conclusion, corporate guarantors can still be liable as joint or primary debtors. Furthermore, if you are a corporate guarantor and your company is regarded as foreign under the Foreign Business Act, the provision of a corporate guarantee to secure a parent or affiliated company's debts would be deemed a service business, which is restricted under List 3 (21) of the Act. Therefore, you would need to obtain a Foreign Business Licence before entering into a guarantee agreement.

If lending and guarantee arrangements involve foreign lenders, then an approval in principle from the Bank of Thailand regarding foreign-exchange control regulations is also likely to be required.