

LEGAL ARTICLE



Guarantee law has recently been amended to give extra protection to a debtor, which in turn could seriously undermine the effectiveness of a bank guarantee. In light with this amendment, it's never been more urgent to review your collateral arrangement with all of your contractors than now.

AMENDMENT TO GUARANTEE LAW DIMINISHES THE LEGAL VALUE OF YOUR GUARANTEE

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The National Legislative Assembly

in exercising Parliament's legislative power under the Provisional Constitution passes the Act Amending the Civil and Commercial Code (No. 20) B.E. 2557 (2014) (the "Amendment Act") to amend guarantee law and mortgage law. This Amendment Act radically shifts the balance of power from a creditor to a debtor. Certain pro-debtor implied terms, which the parties are free to opt out by agreeing otherwise under the existing law, now have become mandatory requirements, which the parties may not agree otherwise.

while the civil law system tends to favor a debtor to achieve a social fairness, the common law system tends to favor a creditor to facilitate and promote commerce.



owner might request the contractor to arrange for a bank to issue a bank guarantee in favor of the project owner to secure contractor's obligations under a contract. In accordance with new guarantee law as revised by the Amendment Act, if the project owner extends any time for performance of the obligations to the contractor without a consent of the bank that issued the bank guarantee, the guarantee will automatically be discharged and the bank will be released from all the obligations under the bank guarantee. This means if your company requires your contractor or supplier to place a bank guarantee with your company, you will need to look at that bank guarantee with more skeptical eyes.

CIVIL LAW JURISDICTIONS' PRO DEBTOR PRINCIPLE

For a background, Thailand follows a civil law tradition, under which commercial law tends to favor a debtor over a creditor. In civil law jurisdictions like continental Europe or Thailand, traditionally commercial law tends to protect a debtor at an expense of a creditor. On the other hand, in common law jurisdictions (e.g. England, the United States and former British colonies), the spirit of commercial law is to promote and facilitate commerce, hence creditor's rights must be sufficiently protected. In other words,

Following the civil law tradition, a drafter of this Amendment Act introduces devices that can offer additional protections to debtors. For easy comparison, the Amendment Act is summarized in the table provided at the end of this article.

POTENTIAL IMPACTS ON BUSINESSES

Guarantee Becomes Less Valuable to Creditor

When a project owner engages a contractor (or a supplier), the project



New Law Discourages Debt Reduction Secured by the Guarantee

In some cases, the creditor offers to reduce the amount of debt to the primary debtor with a condition that the primary debtor has to pay off the reduced debt within an agreed deadline. This kind of settlement offer is obviously beneficial to the debtor.

Under this new law, if the amount of debt is secured by a guarantor, the creditor will no longer be incentivised to offer this kind of settlement. This is because in doing so will entitle the guarantor, instead of the primary debtor, to pay the reduced debt to the creditor at any time, even several months or years after the agreed deadline.



Guarantee without Time Limit Is No Longer Practical

It is no longer practical for a creditor to request a guarantor to provide an open-ended guarantee to secure the obligation of a primary debtor because the guarantor will be entitled to terminate the guarantee without limit of time at any time. If the guarantor can walk away from the guarantee without limit of time at any time, such guarantee is obviously not sufficient to protect the creditor. Practically, a guarantee agreement must be crafted to specify the period of guarantee.

TIME TO REEVALUATE YOUR GUARANTEE

Even if the media seem to suggest that the biggest loser from this Amendment Act is commercial banks, the exact legal consequence of this Amendment Act is not that crystal clear. As a matter of facts, bankers (and their lawyers) have already figured out their solution to get around these limitations by requesting a person who would otherwise provide a personal guarantee to jointly borrow the money from the bank with the primary borrower so as to bypass guarantee law altogether.

Looking the new law from different angle, it may actually benefit commercial banks because it reduces the liability for the bank as an issuer of a bank guarantee.

Under existing law, when a project owner holds a bank guarantee provided by its contractor, the project owner will feel some sort of security. Under new guarantee law, even with the bank guarantee in hand, the project owner must be more cautious because it could (un)intentionally take certain actions that in effect can invalidate the bank guarantee. Whenever any bank guarantee is invalidated for any technical reason, it is a favorable situation for its issuer, i.e. the bank. What about a solution from a project owner who takes a bank guarantee?



Whether the civil law approach or the common law approach works best is subject to a theoretical debate. But in light with this Amendment Act, those in corporate Thailand who take or provide collateral in form a guarantee will need to reevaluate their legal position.

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Summary of Amendments to Guarantee Law

Existing Guarantee Law	New Guarantee Law
Contingent liabilities may be secured.	Contingent liabilities may be secured if only <i>all</i> these conditions are fulfilled: <ol style="list-style-type: none"> (i) an object of creation of the obligation secured is specified; (ii) a nature of the obligation is specified; (iii) the maximum amount of the guarantee is specified; and (iv) a period of guarantee is specified unless it is the guarantee for a series of transactions without limit of time.

Summary of Amendments to Guarantee Law (cont'd)

Existing Guarantee Law	New Guarantee Law
The guarantor may agree to be liable jointly and severally to the creditor with the primary debtor as a co-debtor.	The guarantor may not agree to be liable jointly and severally to the creditor with the primary debtor as a co-debtor.
The guarantor may agree to waive a statutory right to set up defenses which the primary debtor has against the creditor.	The guarantor may not agree to waive a statutory right to set up defenses which the primary debtor has against the creditor.
The guarantor may agree to be liable to the creditor even if the secured obligation of the primary debtor is extinguished by any cause.	The guarantor may not agree to be liable to the creditor if the secured obligation of the primary debtor is extinguished by any cause.
The guarantor may agree to waive a statutory right to terminate the guarantee for a series of transactions without limit of time.	<p>The guarantor may not agree to waive a statutory right to terminate the guarantee for a series of transactions without limit of time.</p> <p>Once the guarantor exercises the statutory right to terminate the guarantee for a series of transactions without limit of time, the guarantor is not liable for transactions done by the primary debtor after the notice has reached to the creditor.</p>
There is no duty for the creditor to notify the guarantor upon occurrence of primary debtor's default of a secured obligation.	Within 60 days after primary debtor's default of a secured obligation, the creditor has to notify the guarantor, otherwise the guarantor shall be released from the liability for an interest and a compensation and other encumbrance expenses of the debt that arise after expiration of the period of 60 days.
There is no special requirement.	<p>If the creditor agrees to reduce an amount of debt with a condition that the primary debtor has to pay the creditor within a specified deadline, the guarantee will be discharged in any of these events:</p> <ul style="list-style-type: none"> (i) the primary debtor fully pays off the reduced amount of debt; (ii) the primary debtor partially pays the creditor the reduced amount of debt, but the guarantor pays a remaining amount to the creditor; or (iii) the primary debtor fails to pay the reduced amount of debt, but the guarantor pays fully the reduced amount of debt. <p>The guarantee is discharged regardless of whether the guarantor manages to pay the creditor the reduced amount of debt within or after the aforementioned deadline.</p>
Creditor's extension of time will result in the guarantee being discharged, unless the guarantor agrees to the extension of time. The guarantor may agree in advance to the extension of time.	Creditor's extension of time will result in the guarantee being discharged, unless the guarantor agrees to the extension of time. The guarantor may not give the agreement in advance to the extension of time.

Summary of Amendments to Mortgage Law

Existing Mortgage Law	New Mortgage Law
There is no special requirement.	<p>If the creditor agrees to reduce an amount of debt with a condition that the primary debtor has to pay the creditor within a specified deadline, the mortgage will be discharged in any of these events:</p> <ul style="list-style-type: none"> (i) the primary debtor fully pays off the reduced amount of debt; (ii) the primary debtor partially pays the creditor the reduced amount of debt, but the mortgagor pays a remaining amount to the creditor; or (iii) the primary debtor fails to pay the reduced amount of debt, but the mortgagor pays the reduced amount of debt. <p>The mortgage is discharged regardless of whether the mortgagor manages to pay the creditor the reduced amount of debt within or after the aforementioned deadline.</p>
A mortgagee is not explicitly required to serve a written notice to a mortgagor prior to enforcement of the mortgage.	Prior to enforcement of the mortgage, the mortgagee is required to serve a written notice to the mortgagor within 15 days after the mortgagee serves a written notice to the primary debtor. Mortgagee's failure to serve such notice within 15 days will result in the mortgagor being discharged from any liability for an interest and a compensation that the primary debtor owes as well as encumbrance expenses of the obligation that arise after the expiration of the period of 15 days.
The measure to enforce the mortgage without filing a suit does not exist.	The mortgagor may request the mortgagee to enforce the mortgage by putting up the mortgaged property for a public auction within one year without the need to file any suit to a court. Mortgagee's failure to put up the mortgaged property for a public action within one year will result in the mortgagor being released from any liability for an interest and a compensation that the primary debtor owes as well as other encumbrance expenses of the obligation that arise after the expiration of the period of one year.

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