

Thailand: Creditors, guarantors and mortgagors (update)

The draft Civil and Commercial Code Amendment Act (No...) B.E... (the "New Amendment Act") has been introduced in response to criticisms of the previous amendment act including that guarantors and mortgagors who are financial institutions or corporate entities should not be granted the same level of protection as guarantors and mortgagors who are non-financial institutions or individuals. This briefing provides an overview of the New Amendment Act.

The Civil and Commercial Code Amendment Act (No. 20) B.E. 2557 (A.D. 2014) (the "Previous Amendment Act") which granted greater protection to guarantors and mortgagors was subject to criticism. The New Amendment Act seeks to address those criticisms and clarify certain other provisions.

Guarantee

Guarantors as primary debtors

The New Amendment Act relaxes the Previous Amendment Act's prohibition on a guarantor being liable as a joint debtor or being jointly liable with the debtor by allowing the guarantor who is a juristic person (including but not limited to financial institutions) to be liable as a primary debtor if it agrees to do so.

Invalid/void provisions

Section 686 of the Civil and Commercial Code, as amended by the Previous Amendment Act, requires the creditor to notify the guarantor within sixty (60) days from the date the debtor is in default. The creditor will only be entitled to require the guarantor to perform the debtor's

obligation after the guarantor has received such notice. Not delivering or delaying in delivering the notice of default to the guarantor will release the guarantor from any interest, compensation or charges accessory to the secured obligation accrued after such 60-day period.

In addition:

- the guarantor is entitled to request that the payment terms and measures applicable to the debtor shall also be applied to him;
- the creditor cannot claim for any default interest accrued during the guarantor's performance; and
- if the creditor refuses to accept the guarantor's performance, the guarantor will be discharged from the guarantee.

The Previous Amendment Act states clearly that certain sections shall not be agreed otherwise and if they are then such agreement is void. It does not, however, address Section 686. As a result an issue arises as to whether Section 686 of the Previous Amendment Act can be agreed otherwise or not. Hence, the New Amendment Act clearly states that

any agreement which is contrary to Section 686 (as amended) is void.

Key issues

- a corporate guarantor and financial institution can now be liable as a primary debtor
- any agreement which contradicts Section 686 of the Civil and Commercial Code (as amended) will be void
- the creditor shall notify the guarantor in writing of any agreement to decrease the secured obligations within 60 days
- a guarantor who is a financial institution or is in the business of providing guarantees for remuneration can give consent in advance to the extension of the due date
- in certain cases, a third party mortgagor can be liable for an amount in excess of the value of the mortgaged property

Decrease in the amount of secured obligation

- To further clarify the mechanism of a creditor's act to decrease the amount of secured obligations (including interest, compensation or charges) under the Previous Amendment Act, the New Amendment Act requires that the creditor shall notify the guarantor in writing of such agreement within sixty (60) days after the agreement is made. In this case, the guarantor shall pay the decreased secured obligation within sixty (60) days after the decreased secured obligation is due. This differs from the Previous Amendment Act where the guarantor may pay the decreased secured obligation regardless of when such decreased secured obligation is due.
- If the creditor fails to serve a written notice within the 60-day period discussed above, the guarantor's right to pay the decreased secured obligation will be extended to sixty (60) days after the date it is actually notified.
- In a case where there is a creditor's act resulting in the decrease of the secured obligation where the creditor's act occurs between the period after the effectiveness of the Previous Amendment Act (i.e. 11 February 2015) and prior to the effectiveness of the New Amendment Act, such creditor shall notify the guarantor of the decreased secured obligation within sixty (60) days after the effectiveness of the New

Amendment Act and shall comply with the mechanism prescribed in the New Amendment Act.

Extension of Time

- The prohibition of the guarantor giving advance consent to the extension of time to be granted by the creditor to the debtor for the performance of an obligation which is to be performed at a definite time under the Previous Amendment Act is relaxed by the New Amendment Act. The New Amendment Act provides that such prohibition is not applicable to a guarantor who is a financial institution or any person (either individual or corporate entity) who is in the business of providing guarantees for remuneration.
- In addition, the New Amendment Act clarifies that an agreement to extend the due date which is made after the debtor is in default is not considered "an extension of due date of the secured obligation". Thus, the guarantor is not released from the guarantee in this regard irrespective of whether the guarantor consents to the agreement or not.

Mortgage – third party mortgage

According to the Previous Amendment Act, a third party mortgagor shall not be liable in excess of the value of the mortgaged property at the time of enforcement either by way of public auction or foreclosure.

The New Amendment Act grants an exemption to the above whereby a third party mortgagor can be liable for

an amount in excess of the value of the mortgaged property at the time of enforcement, if:

- the debtor is a juristic person;
- the third party mortgagor holds management power or controlling power over such debtor; and
- the third party mortgagor entered into a separate guarantee agreement guaranteeing the same underlying debt as in the mortgage.

Transitory Provisions

Any guarantee or mortgage agreement made or entered into between the effective date of the Previous Amendment Act (i.e. 11 February 2015) and prior to the effective date of the New Amendment Act shall continue to be valid and binding to the extent that it does not contradict any provision of the New Amendment Act.

Note: The New Amendment Act was approved by the National Legislative Assembly on 14 May 2015. It will be proposed by the Prime Minister to the King for royal endorsement and subsequently be announced in the Royal Gazette. The New Amendment Act will be effective on the date following the date it is announced in the Royal Gazette.

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