

# Thailand: Creditors, guarantors and mortgagors

A guarantor or mortgagor may legally waive their rights in favour of a creditor or assume liability for a debtor's obligations. In practice, however, creditors may not enforce the mortgage or demand performance of the debtor's obligations from the guarantor as soon as they are entitled to do so. The later the enforcement or demand is made by a creditor, the more interest and charges will accrue on the secured obligation, putting the other parties at a disadvantage.

## Proposed draft

**In order to rectify this situation which is seen as unfair to guarantors, mortgagors and debtors, the National Council for Peace and Order (the "NCPO") proposed a draft Civil and Commercial Code Amendment Act (the "Amendment Act"), for the consideration of the National Legislative Assembly (the "NLA"). On 2 October 2014, the NLA approved the draft Amendment Act.**

## Key change

The draft Amendment Act seeks to protect guarantors and mortgagors by limiting their liabilities. This briefing sets out below the proposed key changes to the CCC under the draft Act and the implications. While guarantors and mortgagors would be expected to benefit from the change, a creditor's rights as the beneficiary of a guarantee or as a mortgagee would be adversely impacted.

## Guarantee

### Guarantee on future or conditional obligation

Section 681 of the CCC, as amended by the Amendment Act, restates that a guarantee can only be given for a valid obligation. A future or conditional obligation may also be secured for an event at which point such obligation would have effect. However, unless the guarantee is for a continuous transaction without limit of time in favour of the creditor, Section 681 requires that the following particulars be clearly specified in a guarantee agreement:

- underlying obligation or contract;
- purpose of creating the underlying obligation;
- type of the underlying obligation;
- maximum guaranteed amount; and
- duration of the underlying obligation or contract.

The guarantor is only liable for the specified obligation or contract.

Any agreement which is contrary to these provisions would be void.

### Creditor's call for the performance of the guarantor

Under the current version of the CCC, the creditor is entitled to demand

performance of the obligation from the guarantor as soon as the debtor is in default. However, Section 686 of the

## Key issues

- The draft Amendment Act seeks to protect guarantors and mortgagors by limiting their liabilities
- The creditor should notify the guarantor within 60 days from the date the debtor is in default
- A guarantor cannot waive certain defences
- A mortgagor may request that the mortgagee enforce the mortgage through a public auction, without any involvement of the court

CCC, as amended by the Amendment Act, requires the creditor to notify the guarantor within 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 to the guarantor will release the guarantor from any interest, compensation or charges accessory to the secured obligation accrued after the 60 days.

**In addition:**

- The guarantor is entitled to request that the payment terms and measures applicable to the debtor also be applied to him.
- The creditor cannot claim for any default interest accrued during the guarantor's performance, provided that the guarantor complies with the payment terms and measures mentioned earlier.
- If the creditor refuses to accept the guarantor's performance, the guarantor will be discharged.

**Decrease in the amount of the secured obligation by creditor**

Under Section 691 paragraph 1 of the CCC, as amended by the Amendment Act, if an act of a creditor results in a decrease in the amount of the secured obligation (including interest, compensation or charges) and such decreased secured obligation has been fully paid, either severally by the debtor or the guarantor or jointly by both of them, the guarantor will be discharged. This will always be the case whether the payment of the decreased obligation was made prior to or after the due date.

Any provision or agreement requiring the guarantor to be liable for an amount in excess of the above will be void.

**Extension of due date of the secured obligation**

The Amendment Act restates that the guarantor will be discharged if he does not agree to an extension of

time granted by the creditor to the debtor for the performance of an obligation which is to be performed at a definite time. The Act further provides that any advance agreement or consent from the guarantor to the extension of time by the creditor is void.

**Invalid/void provisions**

In addition to the provisions above, the Amendment Act clearly states that the following provisions or agreements are void or invalid:

- any provision or agreement requiring the guarantor to be liable as a co-debtor or jointly liable with the debtor;
- any provision or agreement restricting or prohibiting the guarantor from setting up his defences or defences the debtor has against the creditor;
- any provision or agreement requiring the guarantor to still be liable even if the debtor's obligation is extinguished; and
- any provision or agreement which contradicts the provisions on termination rights and liability of the guarantor in the case of a guarantee granted for a continuous transaction without limit of time in favour of the creditor under Section 699 of the CCC.

**Transitory provisions**

If a debtor defaults on or from the effective date of the Amendment Act, the rights and duties of the creditor and guarantor will be in accordance with the amended Section 686 (as mentioned above).

If an act of a creditor resulting in a decrease in the amount of the secured obligation (including interest, compensation or charges) occurs on

or from the effective date of the Amendment Act, the guarantor will be discharged in accordance with the conditions specified in the amended Section 691 paragraph 1 (as mentioned above).

## Mortgage

**Application of certain guarantee provisions to a mortgage**

While, under Section 727 of the current version of the CCC, the application of certain guarantee provisions is only relevant for a sole third party mortgagor, the Amendment Act also covers co-mortgagors.

**Limitation on liability of the third party mortgagor**

The third party mortgagor must not be liable for an amount in excess of the value of the mortgaged property at the time of enforcement either by way of public auction or foreclosure. Any agreement to the contrary of this provision will be void, regardless of whether such agreement is specified in a mortgage agreement or in a separate agreement (excluding a guarantee agreement).

**Enforcement of mortgage against the mortgagor**

One of the key new developments under the Amendment Act is that a mortgagor may request that the mortgagee enforce the mortgage through a public auction, without any involvement of the court.

**Public auction through the court proceeding (Section 728)**

The mortgagee must notify the debtor in writing to perform his obligation within a reasonable time which must not be less than 60 days from the date the debtor receives such written

notice. If the debtor fails to comply with such notice, the mortgagee may file a claim to the court for a judgement ordering the mortgaged property to be seized and sold by public auction.

Another new feature under the Amendment Act is that the mortgagee is also required to serve a copy of the notice to the debtor to the third party mortgagor within 15 days after the date of delivery of such notice to the debtor. Failure to do so will result in the third party mortgagor being released from any interest or compensation owed by the debtor to the mortgagee, including any charges, accrued after such 15 days.

#### **Public auction without the court's involvement (Section 729/1)**

If there is no other registered mortgage or preferential right over the mortgaged property, the mortgagor may send a written notice to the mortgagee requesting that the mortgagee sell the mortgaged property by way of public auction, without filing a claim to the court. In this case, the mortgagee is obliged to proceed with the public auction within 1 year after receipt of such request from the mortgagor. If the mortgagee does not proceed with the public auction within the specified period of time, the mortgagor will be released from any interest or compensation owed by the debtor to the mortgagee and any charges accrued after 1 year. This public auction will result in the mortgage being extinguished.

#### **Foreclosure (Section 729)**

The Amendment Act restates conditions for foreclosure, with a minor amendment that the mortgagor must satisfy the court that the value of mortgaged property is less than the amount due.

Any provision or agreement contrary to the amended Section 728 and Section 729 will be void.

#### **Liability for mortgage shortfall/ deficiency**

Normally, the creditor, debtor and the third party mortgagor would agree in a standard mortgage agreement that if the proceeds from the enforcement are insufficient to repay the secured obligation, the mortgagor will be liable for the difference. This would be implemented as an informal "guarantee" granted to the mortgagee.

However, under the newly proposed Section 729/1 of the CCC, this practice has ceased as Section 729/1 clearly states that the third party mortgagor must not be liable in excess of the value of the mortgaged property at the time of enforcement. This means that the third party mortgagor must not be liable for any difference if the proceeds from the enforcement/foreclosure are insufficient to repay the secured obligation. Any agreement to the contrary will be void. Nevertheless, the mortgagee is still allowed to demand the difference from the debtor.

#### **Rights and obligations of the transferee of mortgaged property**

To be entitled to enforce the mortgage against the transferee of the mortgaged property, the mortgagee must serve the transferee a written notice specifying his intention, not less than 60 days prior to the enforcement of the mortgage. Any agreement to the contrary is void (Section 735).

The transferee may redeem the mortgage at any time (by repaying the mortgagee the secured obligation), but, if the transferee has been served

an enforcement notice, he must redeem the mortgage within 60 days after his receipt of such notice (Section 737).

#### **Transitory provisions**

The amended Section 727 (i.e. the application of certain guarantee provisions to the mortgage mentioned in above) shall apply to any mortgage agreement in effect as of the effective date of the Amendment Act.

In addition, the amended Section 728 and Section 735 of the Amendment Act regarding enforcement of mortgages shall apply to any enforcement occurring on or from the effective date of the Amendment Act.

If a transferee of the mortgaged property intends to redeem a mortgage after being notified of the mortgagor's intention to enforce the mortgage, the 60 day period under the amended Section 737 of the Amendment Act shall also apply.

## **Impact of the Act**

Although the Amendment Act provides greater protection to the guarantor and the mortgagor, these guarantor and mortgagor-friendly provisions may impact on the ability of entrepreneurs and large business enterprises to obtain credit or financing from banks or other financial institutions.

If you would like to discuss any of the issues raised in this briefing please contact the authors below.

*Note:*

*The draft Amendment Act will be proposed by the Prime Minister to the King for royal endorsement and subsequently be announced in the Royal Gazette. The Amendment Act will be effective after 90 days from the date it is announced in the Royal Gazette.*

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