



Rights and liabilities of a guarantor

FINANCIAL institutions may require guarantees to enhance the credit standing of prospective borrowers, thus enabling them to obtain financing. Many people think that a guarantor gives a reference of the good character of the borrower. They do not realise that they are legally bound to pay back the loan if the borrower cannot or will not pay.

This article provides information on the details and implications of guarantees given by individuals and aims to increase public understanding on guarantees. It guides you on the legal requirements, rights and liabilities of a guarantor as well as highlights the important issues that a person should be aware of before agreeing to become a guarantor.

WHAT IS A GUARANTEE?

A guarantee is a legal contract that binds you to pay the debt of the borrower if the borrower fails to do so. The financial institution can sue you when the borrower does not pay back his/her debt.

WHO CAN BE A GUARANTOR?

Anyone can be a guarantor as long as the person can meet the legal requirements to be a guarantor. However, since a guarantor would be liable to pay the debts of the borrower in the event the borrower defaults, you should consider becoming a guarantor only if you are sure that you can pay the debts of the borrower in the unfortunate event that he/she fails to do so.

The legal requirements of a guarantor include the following:

- Must be 18 years old or above.
- Must not be a bankrupt.
- Must be of sound mind and have the mental capacity to understand the guarantee document and the responsibilities and obligations of a guarantor.
- Must have freely consented to being a guarantor (i.e. should not have been forced or must not have entered into the contract under undue influence, fraud, misrepresentation or by mistake). Nevertheless, the final decision whether or not to accept you as a guarantor lies with the financial institution.

RIGHTS OF A GUARANTOR

There are certain rights accorded to you as a guarantor before and after signing the contract of guarantee. These include:

- The right to obtain a copy of the letter of guarantee or contract of guarantee and any other documents in relation to the loan



transaction.

- The right to seek advice from your lawyer before signing the contract of guarantee. (Nevertheless, you will have to pay the legal fees yourself).
- The right to the information on the outstanding balance of the account of the borrower with the financial institution subject to the borrower's consent.
- The right to call upon the borrower to pay off the loan to release you from all your liabilities under the guarantee. This right can be exercised at anytime and even before the financial institution has called upon the borrower to pay the debt. However, this right may be subject to the terms and conditions of the loan, which may vary from customer to customer.
- The right to be indemnified by the borrower for any payment made to the financial institution. This means that you can sue the borrower for the amount that you have paid to the financial institution.

LIABILITIES OF A GUARANTOR

More often than not, guarantors willingly sign the contract of guarantee without fully realising the impact it may have in the future. Therefore, it is extremely important for a prospective guarantor to read and understand the contract of guarantee before signing. Below are some points to explain the liabilities of a guarantor:

- The extent of the liability of a guarantor will be as specified in the guarantee document.
- A guarantor may be held liable for the liabilities of the borrower in accordance with the terms of the guarantee document.
- A guarantor can only be rendered liable under a guarantee if the borrower is in default of any payment to the financial institution and the financial institution makes

a demand on the guarantor.

INDEPENDENT LEGAL ADVICE

It is imperative that you obtain independent legal advice before signing a contract of guarantee. This will ensure that you are aware of the true nature of the document and its legal implications, for example your rights and liabilities under the guarantee, especially if the financial institution changes the terms and conditions during the tenure of the loan.

LIMITATION OF ACTION AGAINST GUARANTORS

- Where a guarantee is made payable on demand, a financial institution cannot bring an action against the guarantor until a demand has in fact been made under the guarantee against the guarantor.
- Depending on the provisions of the contract of guarantee, a demand may be served by hand, by ordinary post or by registered mail.
- The financial institution has six years from the date of the first demand to bring legal action against the guarantor.

DISCHARGE OF GUARANTORS

- A guarantor is released from his obligations under a guarantee upon full payment of the debt owing to the financial institution.
- For a guarantee to be enforceable against the guarantor, the terms of a guarantee must be adhered to by the financial institution.

DO'S AND DON'TS

- Read and understand the nature of the guarantee. A prospective guarantor must not sign a document that he has not read or sign a document which is in fact a blank form or

a partially completed form. A person signing such a document would have no defence in law should he decide to challenge it in the court of law.

- You should seek professional/legal advice on the legal implications of the guarantee before signing.
- Check and ensure that the guarantee is subject to the laws of Malaysia.
- Be wary about giving a photocopy of your identity card or passport to anyone other than the financial institution or the lawyers acting on your behalf.
- **DO NOT** sign any guarantee if you:
 - Do not have a financial, business or moral interest in the transaction and are uncertain as to the nature of the transaction.
 - Have doubts as to the ability or integrity of the borrower.
 - Feel that you are under undue pressure or duress to do so.
 - Do not understand the terms of the guarantee and do not have an independent party explaining it to you.
 - Believe that you have no capacity to settle the debts of the borrower if he fails to pay.

- **ALWAYS** ensure that:
 - The maximum amount to be guaranteed is clearly stipulated and whether it is inclusive of accrued interest.
 - You are aware of your liabilities in the event that variations are made to the terms and conditions of the loan.
 - In a joint or joint and several guarantee, all the guarantors sign the guarantee.
 - The name of the borrower is clearly stated on the guarantee document.
 - You seek clarification or explanation on any of the terms of the guarantee, if in doubt. If necessary, seek legal advice before signing.

WHAT A GUARANTOR OUGHT TO KNOW

A loan can be guaranteed by one or more guarantors. However, this does not mean that the liabilities of the guarantors are shared equally amongst themselves. The financial institution has the right to recover the debt wholly or partially from any of the guarantors.

- **Joint Guarantee**
Under a joint guarantee, upon the death of one of the guarantors, the obligations under the guarantee passes to the surviving guarantors.
- **Joint and Several Guarantee**
Under a joint and several guarantee, upon the death of one of the guarantors, the estate of the deceased guarantor will remain liable under the guarantee together with the other guarantors.

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