

Guarantors

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YOUR LOANS

Guarantors

A consumer education programme by:



BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA



PERSATUAN BANK BANK DALAM MALAYSIA
THE ASSOCIATION OF BANKS IN MALAYSIA

contents

- 1 Introduction
- 2 What is a guarantee?
Who can be a guarantor?
- 3 Rights of a guarantor
- 4 Liabilities of a guarantor
- 5 Independent legal advise
- 6 Limitation of action against
guarantors
Discharge of guarantors
- 7 Do's and Don'ts
- 9 What a guarantor ought to know
- 10 Frequently asked questions
- 16 Glossary

Disclaimer

This document is intended for your general information only. It does not contain exhaustive advice or information relating to the subject matter nor should it be used as a substitute for legal advice.

Date: 15 January 2004



Guarantors are
legally bound
to pay back the loan if the
borrower cannot pay

Introduction

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 realize that they are legally bound to pay back the loan if the borrower cannot or will not pay.

This booklet 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.

There are certain
rights
accorded
to you as 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



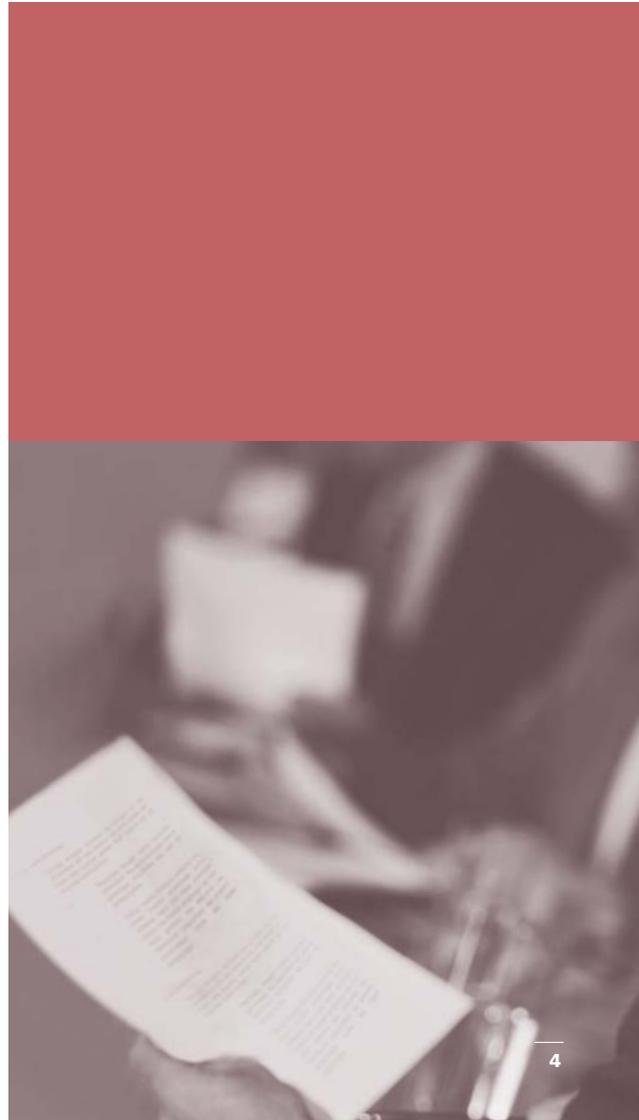
upon the borrower to pay the debt. However, this right may be subject to the terms and conditions of the loan, which may vary from customer to customer

- 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



You should seek
legal advice
on the legal
implications
of the guarantee
before signing

- 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.

Ensure that you are aware of your **liabilities** in the event that **variations** are made to the terms and conditions 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.

Under a **joint and several guarantee**, upon the death of one of the guarantors, the estate of the deceased guarantor will remain liable

FREQUENTLY ASKED QUESTIONS

Why do financial institutions need a guarantee?

A financial institution may require a guarantee as a means to enhance the credit standing of the prospective borrower and thus enabling him/her to obtain financing.

Guarantees are normally given in favour of the financial institution and it is normally a standard document written with legal terminology. I do not understand them. What do I do?

You can request the bank officer to explain the legal implications to you or if you choose to, you can have the guarantee explained to you by your lawyer. Don't sign the guarantee if you are not comfortable with any of the clauses.

I have given a guarantee for a certain loan and the loan principal has reduced as a result of regular payments. The borrower has approached the financial institution for an increase in facilities which is within the amount of the guarantee signed by me. Am I liable for the newly increased amount?

No. If your guarantee is for a specific loan, the extent of your liability on the guarantee will diminish with the amounts paid. If the lender wishes to increase the loan against your guarantee, the financial institution will either have to obtain a fresh guarantee from you or seek your written consent to the continuation of your guarantee for the increased amount.

In the case of overdraft facilities, generally, the guarantor will remain liable up to the limit he/she has guaranteed for and any increase of the limit will require the guarantor's consent.

Does my signature have to be witnessed?

Yes. Guarantees would normally be signed in the presence of a third party although it is quite common for the financial institution's officer to act as a witness. However, financial institutions will not normally allow a person to be a witness for his/her spouse without independent advice.

How do I withdraw as a guarantor?

A guarantor may request to be released from the guarantee. However, the decision is up to the financial institution. The financial institution may:

- Agree without conditions
- Agree subject to an equivalent replacement guarantor. However, this is subject to the new guarantor agreeing to assume the present, past and future liabilities of the existing guarantor
- Agree subject to part of the debt being repaid
- Disagree unless the principal debt is fully repaid
- Demand repayment of the entire debt

Can I agree to be a guarantor for only a specific period of time?

Yes. However, this depends on the borrower's arrangement with the financial institution.

Can I be made a bankrupt in the event that the borrower does not repay his/her loan to the financial institution?

Yes. If the debt is equal or more than RM30,000 as defined by the Bankruptcy Act 1967, the financial institution can take bankruptcy action against you to recover the debt.

What if I am not agreeable to or would like to vary some of the terms in the contract of guarantee?

All financial institutions have their own standard document for a contract of guarantee to protect the financial institutions' interest. Ultimately, you will have to decide, after due legal counsel if necessary, whether or not to sign the guarantee on the terms required by the financial institution.

Will I be discharged from my guarantee upon the death of the borrower?

No. The financial institution will freeze the account of the borrower to determine the indebtedness and unless there are other sources of payment, the financial institution will seek recourse from the guarantor.

If there is more than one guarantor and each of them came to the financial institution at different times to sign the guarantee, how should we sign?

It is advisable that all guarantors sign on the same document at the same time. However, in this particular type of situation, the respective guarantors can sign one guarantee document at different times (within a reasonable time frame and without undue delay).

I don't read or write English. Can I execute a guarantee in the English language?

The guarantor is advised to have the document translated to him and it must be expressly stated on the document that the contents of the document has been explained and fully understood by the guarantor.

Can I be a guarantor for a loan taken by my spouse or child?

Yes. However, the financial institution has the discretion whether to accept you as a guarantor.

If I decide to be a guarantor, do I have the right to be informed of the status of the borrower's account?

You have the right to be informed of the account you guaranteed, subject to the borrower's consent. Guarantors will normally receive a carbon copy of the reminder letter which was sent to the borrower. However, the financial institution has no obligation to disclose any information on the borrower's other account(s) which is not related to your guarantee.

Is there a maximum age to be accepted as a guarantor?

Financial institutions have the discretion to accept anyone as a guarantor as long as the legal requirements of a guarantor are met.

What if I am not agreeable to the changes made in the terms and conditions to the loan granted to the borrower after the contract of guarantee has been signed?

Most financial institutions would include the right to vary the terms and conditions of the loan agreement. It is therefore important for a prospective guarantor to read and understand the implications of the guarantee and seek independent legal advice, where necessary.

Can a financial institution take legal action against the borrower and guarantor at the same time without exhausting all means to go after the borrower first?

A financial institution has the discretion to commence legal action against the borrower and guarantor either at the same time or after exhausting all legal avenues against the borrower. However, with effect from 1 October 2003, the Bankruptcy Act 1967 provides that for social guarantors, i.e. a person who provides a guarantee for purposes such as:

- Loan, scholarship or grant for educational or research purposes
- Hire-purchase transaction for vehicle for personal or non-business use
- Housing loan solely for personal dwelling

a creditor shall not be entitled to commence **bankruptcy action** unless he proves that he has exhausted all avenues to recover all debts owed to him by the borrower.

In addition, for personal loans up to RM250,000 taken after 26 May 2001, financial institutions are required to use their best endeavours to recover the debts from the borrower and may only initiate legal action against the guarantor after one year from the date of initiation of legal action against the borrower.

GLOSSARY

Guarantor

Someone who makes an official agreement to be responsible for the debt of another person.

Liability

Legal responsibility to pay.

Contract of Guarantee

An agreement whereby the guarantor guarantees to settle the outstanding debts of the borrower in case the borrower fails to pay back the loan.

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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