



THE LAW SOCIETY OF IRELAND

Commercial Lending Seminars

Aspects of Guarantees

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Why Guarantees?

- Commercial risk management and risk allocation
- Additional layer of protection for the bank
- The rules of liability which apply to the loan agreement may not apply to the guarantee

What is a Guarantee?

- It is a promise by an individual or a company to pay another's debt upon the default of that other person or upon a specific event
- It is not a security
- It is a contractual right – a *right in personam*

Types of Guarantee

- Unilateral Contract
- Specific or Continuing
 - Rule in Clayton's Case
- Limited or Unlimited

Limited – 2 Types

Example:

Lender advances €10,000 to a borrower.

Guarantor can either guarantee:

(a) €5,000 of the €10,000

Pay €5,000 – can take over securities & can prove in bankruptcy

(b) The full €10,000 with a cap on liability of €5,000

Pay €5,000 – cannot take over securities & can prove in bankruptcy – need to pay the full €10,000

Guarantee v Indemnity

- A guarantor's liability is co-extensive with the principal debtor's obligation
- An indemnity is a primary obligation of the person giving it
- “An Indemnity is a contract by one party to keep the other harmless against a loss” – *Yeoman Credit Ltd v Latter (1961)*

Guarantee v Letter of Comfort

- A Letter of Comfort is often simply a statement from a parent company that it intends to support its subsidiary
- As an “expression of present intention”, the giver of the letter can change its mind
- A Letter of Comfort is usually expressed not to create payment obligations

Some Formalities

- Statute of Frauds (Ireland) 1695 – the guarantee must be in writing (or a clear memorandum thereof) and signed
- *Bank of Ireland v McCabe (1994)* – a verbal renewal of a guarantee is not sufficient
- “Authenticated Signature Fiction” e.g. headed notepaper

EC (Unfair Terms in Consumer Contracts) Regulations 1995

- Only applies to contracts with a consumer not individually negotiated
- Will be unfair if it is
 - Contrary to the requirements of good faith
 - Causes a significant imbalance to the detriment of the consumer
- Consequences are that the term is not binding on the consumer

Other Formalities

- Consumer Credit Act 1995
- s60 CA 1963 and s31 CA 1990
- Capacity and authority of a Company to give a guarantee – *Re PMPA Garage (Longmile Road) Ltd (1992) ILRM 337*
- Company Law Review Group – Recommendations on Corporate Vires

Insurance Act Issues

- EC (Non-Life Insurance) Framework Regulations 1994
- Annex 1 Class 15 – Suretyship Insurance
- Guarantee in breach will be void
- Single transaction could breach Regulations

Sample Guarantee

THIS GUARANTEE is made on ●●● 2006

BETWEEN

- (1) **Rich Limited** being a company incorporated under the laws of Ireland (registered number 999998) having its registered office at Wealthy Lane, Dublin 1 (the "**Guarantor**" which expressions shall include its successors and assigns)

IN FAVOUR OF

- (2) **BANK LIMITED** having its registered office at Bank House, Money Street, Dublin 2 (the "**Bank**")

Note: Take care when the names of the Guarantor and the Principal Debtor are the same. This might indicate they are related e.g. husband and wife.

RECITING:-

- A. Borrower Limited being a company incorporated under the laws of Ireland (registered number 999999) having its Registered Office at Credit House, Debtors Street, Dublin (the "**Principal**") entered into a loan agreement with Bank on ●●● 2006 (the "**Loan Agreement**").

Note: The Principal is the entity which has the primary obligation to repay to the Bank.

- B. The Guarantor wishes to provide this Guarantee to the Bank in respect of the Principal's Obligations (as defined below).

WITNESSES as follows:-

In consideration of the sum of €10 paid by Bank to the Guarantor, the receipt and sufficiency of which is hereby acknowledged by the Guarantor and for other good and valuable consideration, it is hereby agreed as follows:

1 THE PRINCIPAL'S OBLIGATIONS

In this Guarantee the expression the "**Principal's Obligations**" means all liabilities, actual or contingent, now existing or hereafter incurred by the Principal to Bank under the Loan Agreement (whether in either case due, owing or incurred by the Principal alone or jointly with any other person(s) and in whatever name, firm or style and whether as primary obligor or surety) together with interest thereon.

Note: The lender will require this clause to be drafted as widely as possible to capture all the liabilities and obligations of the Principal Debtor. The Guarantor should be made fully aware of the extent of this clause so that it is aware exactly what it is guaranteeing. Care should be taken to ensure the guarantee does not extend beyond what the Guarantor understood would be the case e.g. if it is drafted to extend beyond the Loan Agreement.



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THANK YOU

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