

THE IMPACT OF THE AMENDMENT TO THE PRINCIPLE OF SURETYSHIP UNDER THE CIVIL AND COMMERCIAL CODE AMENDMENT ACT, (NO.20 AND NO.21), ON THE SECURITY FORMS UNDER THE CONSTRUCTION CONTRACT FOR LARGE PROJECT*

Pakorn Sirinanthananon[†]

ABSTRACT

A guarantee, which is given by any third party, is one of the important securities required under a construction contract for large projects. Throughout the terms of construction contract, the contractor has many duties, responsibilities and obligations which are executed in accordance with the terms and conditions thereunder. Significant duties of the contractor are (i) the duty to complete the construction work within the schedule, which can be divided into sub schedules, called milestones, and (ii) the duty to achieve all guaranteed figures of the construction work. If the contractor fails to make the construction work in accordance with their duties, the owner shall be entitled to claim the damages from the contractor. In order to ensure that the contractor has capability to pay the damages to the owner, the owner shall require an additional security from the contractor and it is most likely a third party guarantee is one.

There are many types of third-party guarantee which are used in the construction business in Thailand, for instance, a performance guarantee, a retention money guarantee, and an advance payment guarantee, but most of these third-party guarantees, which are used, are subject to the law of suretyship under Thai Civil and

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[†] Graduate student of Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University.

Commercial Code (“CCC”). The amendment to significant principles of the law of suretyship in 2014 and 2015 introduced (i) additional duties, for instance, duty to notify the guarantor when the contractor has defaulted or the contractor and the owner have an agreement concerning the reduction of the secured amount, and (ii) the prohibition against an agreement that the guarantor binds himself as primary obligor or grants an advance consent on the time extension, although exceptions thereof were added by the latter amendment.

This research studied (i) the suitability of the third-party guarantee, which is governed by the amendments to the principle of suretyship under the CCC, to be an additional security under the construction contract for large projects and (ii) the possibility of using the guarantees from the third party under international laws or practices, namely a standby letter of credit in accordance with International Standby Practices (“ISP98”) and an independent guarantee and a stand-by letter of credit (“Undertaking”) in accordance with United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (“Convention”), in lieu of this third party guarantee by comparing the advantages and disadvantages on issues of third-party guarantees.

From the study, it is found that the additional duty of the owner, as a creditor to the construction contract, to notify the guarantor is dissimilar from international laws and practices that the construction contract for large projects mostly has to comply with. Hence, if the third-party guarantee was used in the construction contract, as suretyship, related parties have to educate himself and understand this amended principle to practice accordingly. The research also explored whether the additional duties and prohibitions under the amended principle of suretyship can be relieved by the use of a standby letter of credit covered by the ISP 98 and an independent guarantee and a stand-by letter of credit covered by the Convention, but, either of them also has an issue concerning the application mechanism under Thai Law. If parties to the construction contract wish to use these international laws and practices, such parties have to take this issue into consideration, and apply international laws and

practices, whether the ISP 98 or the Convention which is fitted for their fact and situation.

Keywords: Guarantee, Suretyship, Amended Principle of Suretyship, Standby Letter of Credit, Independent Guarantee, ISP 98, United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, Construction Contract, Large Projects

บทคัดย่อ

การรับประกันโดยบุคคลภายนอกเป็นหลักประกันประเภทหนึ่งซึ่งมักถูกนำมาใช้ควบคู่กับสัญญาก่อสร้างโครงการขนาดใหญ่ ภายใต้การก่อสร้างโครงการขนาดใหญ่ผู้รับจ้างมีหน้าที่ และความรับผิดชอบหลากหลายประการ และหนึ่งในหน้าที่ที่สำคัญของผู้รับจ้างคือ หน้าที่ในการก่อสร้างสิ่งปลูกสร้างให้แล้วเสร็จสมบูรณ์ ทั้งในด้านเวลาซึ่งผู้รับจ้างจะต้องก่อสร้างสิ่งปลูกสร้างให้แล้วเสร็จภายในระยะเวลาที่กำหนด และในด้านคุณภาพซึ่งสิ่งปลูกสร้างนั้นจะต้องมีคุณภาพ, คุณสมบัติ และเป็นไปตามข้อกำหนดต่างๆ ตามที่ระบุไว้ในสัญญา ในกรณีที่ผู้รับจ้างไม่สามารถดำเนินการก่อสร้างสิ่งปลูกสร้างให้แล้วเสร็จสมบูรณ์ตามที่ระบุไว้ในสัญญา ผู้ว่าจ้างย่อมมีสิทธิเรียกร้องค่าเสียหายที่เกิดขึ้นจากผู้รับจ้าง ทั้งนี้ เพื่อให้การรับประกันแก่ผู้ว่าจ้างว่า เมื่อผู้ว่าจ้างเรียกร้องค่าเสียหาย ผู้รับจ้างจะสามารถชำระค่าเสียหายที่เกิดขึ้นดังกล่าวแก่ผู้ว่าจ้างได้ ผู้ว่าจ้างจะเรียกร้องให้ผู้รับจ้างส่งมอบหลักประกันการชำระหนี้ให้แก่ตน ซึ่งการรับประกันโดยบุคคลภายนอกก็เป็นรูปแบบหนึ่งของหลักประกันดังกล่าว

การรับประกันโดยบุคคลภายนอกซึ่งใช้ในธุรกิจก่อสร้างมีหลายประเภท เช่น หลักประกันสัญญา (Performance Guarantee), หลักประกันการรับเงินค่าจ้างล่วงหน้า (Advance Payment Guarantee) และหลักประกันการรับเงินประกันผลงาน (Retention Money Guarantee) เป็นต้น เนื่องจากการรับประกันโดยบุคคลภายนอกอยู่ภายใต้หลักกฎหมายค้าประกันแห่งประมวลกฎหมายแพ่งและพาณิชย์ ดังนั้นการแก้ไขเพิ่มเติมหลักกฎหมายดังกล่าวย่อมส่งผลกระทบต่อหลักการรับประกันโดยบุคคลภายนอก วิทยานิพนธ์ฉบับนี้ศึกษาเกี่ยวกับประเด็นดังต่อไปนี้ (1) ความเหมาะสมของการใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายค้าประกันที่มีการแก้ไขเพิ่มเติมเป็นหลักประกันภายใต้สัญญาก่อสร้างโครงการขนาดใหญ่ และ (2) ความเป็นไปได้ในการใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศหลักประกัน ซึ่งได้แก่ สแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้กฎเกณฑ์ International Standby Practices (ISP 98) และอินดิเพนเดนทก์การ์ันตีและสแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้อนุสัญญาสหประชาชาติว่าด้วยอินดิเพนเดนทก์การ์ันตีและสแตนด์บายเลตเตอร์

ออฟเครดิต (United Nation Convention on Independent Guarantees and Stand-by Letters of Credit)

แทนที่การใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติม โดยการเปรียบเทียบข้อดีและข้อด้อยในแต่ละประเด็นของการรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายต่างๆ

จากการศึกษาพบว่าหลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติมนั้น ได้เพิ่มเติมหน้าที่ให้แก่เจ้าหนี้(ซึ่งภายใต้สัญญาก่อสร้างคือผู้ว่าจ้าง) ในกรณีที่ถูกหนี้(ซึ่งภายใต้สัญญาก่อสร้างคือผู้รับจ้าง) ผิดนัดภายใต้สัญญาก่อสร้าง หรือในกรณีที่ผู้ว่าจ้างและผู้รับจ้างตกลงกันลดจำนวนหนี้ที่มีการรับประกันลด โดยให้แจ้งไปยังผู้รับประกันภายใน 60 วันนับแต่วันที่ผู้รับจ้างผิดนัดหรือวันที่คู่สัญญาทั้งสองฝ่ายตกลงร่วมกัน แล้วแต่กรณี ซึ่งหน้าที่ในลักษณะดังกล่าวไม่ได้ถูกกำหนดไว้ภายใต้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศเกี่ยวกับการรับประกันโดยบุคคลภายนอก ดังนั้นถ้าคู่สัญญาภายใต้สัญญาก่อสร้างโครงการขนาดใหญ่ตกลงที่จะนำการรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติมมาใช้แก่สัญญาก่อสร้างดังกล่าวแล้ว หากคู่สัญญาฝ่ายใดฝ่ายหนึ่งหรือทั้งสองฝ่ายขึ้นเคยกับการใช้การรับประกันโดยบุคคลภายนอกภายใต้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศ คู่สัญญานั้นจะต้องศึกษาหลักกฎหมายค้ำประกันที่มีการแก้ไขเพิ่มเติมโดยละเอียดเพื่อหลีกเลี่ยงการปฏิบัติที่ไม่สอดคล้องกับหลักกฎหมายดังกล่าวจะทำให้สูญเสียสิทธิที่พึงได้รับ

ยิ่งไปกว่านั้นจากการศึกษาพบว่าผลกระทบที่สำคัญต่างๆ ต่อการรับประกันโดยบุคคลภายนอกอันเกิดจากการแก้ไขเพิ่มเติมหลักกฎหมายค้ำประกันนั้น สามารถลดลงได้ด้วยการใช้สแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้กฎหมายไอเอสพี 98 และอินดิเพนเดนท์การ์ันตีและสแตนด์บายเลตเตอร์ออฟเครดิต ภายใต้อนุสัญญาสหประชาชาติว่าด้วยอินดิเพนเดนท์การ์ันตีและสแตนด์บายเลตเตอร์ออฟเครดิต อย่างไรก็ตามการนำหลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศดังกล่าวมาใช้ ก่อให้เกิดประเด็นเกี่ยวกับการบังคับใช้หลักกฎหมายดังกล่าวภายใต้หลักกฎหมายไทย ดังนั้นถ้าคู่สัญญาแห่งสัญญาก่อสร้างโครงการขนาดใหญ่ต้องการนำหลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศเกี่ยวกับการรับประกันโดยบุคคลภายนอกมาใช้แล้วภายใต้หลักกฎหมายไทยแล้ว ประเด็นเกี่ยวกับการบังคับใช้ดังกล่าวเป็นประเด็นที่คู่สัญญานั้นจะต้องนำมาพิจารณาต่อไป และเลือกใช้หลักกฎหมายระหว่างประเทศหรือธรรมเนียมการค้าระหว่างประเทศเกี่ยวกับการรับประกันโดยบุคคลภายนอกที่เหมาะสมกับข้อเท็จจริงเป็นกรณีๆ ไป

คำสำคัญ: หลักประกัน, การค้ำประกัน, การแก้ไขเพิ่มเติมกฎหมายว่าด้วยการค้ำประกัน, สแตนด์บายเลตเตอร์ออฟเครดิต, อินดิเพนเดนท์การ์ันตี, ไอเอสพี 98, อนุสัญญาสหประชาชาติว่าด้วยอินดิเพนเดนท์การ์ันตีและ สแตนด์บายเลตเตอร์ออฟเครดิต, สัญญาก่อสร้าง, โครงการขนาดใหญ่

1. INTRODUCTION

One of the significant obligations of the Contractor is an obligation to guarantee. Under the construction contract for large project, many kinds of guarantee were given by the Contractor to the Owner, for instance, (i) the completion guarantee wherein the Contractor guarantees that a construction work will be completed within the agreed timeline, or (ii) the performance guarantee wherein the Contractor guarantees that the completed construction work will be achieved or will meet any and all guarantee figures. In the event that any guarantee is not achieved for reason attributable to the Contractor, the Owner shall be entitled to demand the Contractor to pay the damages. Additionally, in order to ensure that the Owner will receive such damages, a guarantee from any third party (“Third Party Guarantee”), as additional security, shall be required by the Owner from the Contractor. Since there is no specific law concerning Third Party Guarantees in Thailand, the principle of law which is used to govern or interpret the Third Party Guarantee should be the principle of suretyship under Thai Civil and Commercial Code (“CCC”).

In B.E. 2557 and B.E. 2558, the principle of suretyship under the CCC was amended. The amendment to the principle of suretyship introduced (i) additional duties, and (ii) prohibitions.

This research studied (i) the suitability of the Third Party Guarantee, which is governed by the amendments to the principle of suretyship under the CCC, to be an additional security under the construction contract for large projects and (ii) the possibility of using the guarantees from any third party under international laws or practices, in lieu of the Third Party Guarantee governed by the amended principles of suretyship by comparing the advantages and disadvantages on key issues of the Third Party Guarantee.

From the study, the significant impacts of the use of the amended principles of suretyship on the Third Party Guarantees under the construction contract for large projects are identified, together with the advantages and disadvantages among the standby letter of credit in accordance with International Standby Practices (“ISP98”), the independent guarantee and stand-by letter of credit (“Undertaking”) in accordance with United Nations Convention on

Independent Guarantees and Stand-by Letters of Credit (“Convention”) and the Third Party Guarantee which is governed by the amended principles of suretyship.

2. THE THIRD PARTY GUARANTEE UNDER THE CONSTRUCTION CONTRACT FOR LARGE PROJECTS

Under the construction contract for large projects, if the Contractor breaches any of his obligations, the Contractor shall be liable for any and all damages occurred to the Owner. To ensure that the Owner will receive such damages whether the actual damages or the liquidated damages, an additional security from the Contractor may be requested by the Owner. One of the widely used additional securities in the construction business is the Third Party Guarantee.

The Third Party Guarantees were used as an additional security for various purposes.¹ Many international construction contract forms, for instance, the FIDIC[®] Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (“FIDIC Red Book”), and the FIDIC[®] Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant, and for Building and Engineering Works designed by the Contractor (“FIDIC Yellow Book”) have the provisions related to the use of the Third Party Guarantee.

2.1 Types of the Third Party Guarantee under the Construction Contract

The Third Party Guarantees, which are usually used under the construction contract for large projects, can be summarized as follows:²

Performance Guarantee

The purpose of a Performance Guarantee is to secure that the Contractor shall duly and timely perform his obligations under the construction contract.³

¹ Ellos Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, **FIDIC Contracts: Law and Practice**, (London: Informa, 2009), 379-381.

² Joseph A. Huse, **Understanding and Negotiating Turnkey and EPC Contracts**, 2nd Edition (London: Sweet&Maxwell, 2002), 64.

Advance Payment Guarantee

The purpose of a Performance Guarantee is to protect the Owner from the risk of non-repayment of the advance payment which the Contractor requests from the Owner to assist Contractor's cash flow at the initial stage of a construction project.⁴

Retention Money Guarantee

Under some construction contract for large projects, the Owner shall be entitled to retain a fixed percentage from any progress payment made as per the execution of the construction work by the Contractor. The money retained is called "Retention Money". The purposes of Retention Money are to provide another additional security, in the form of a fund, against the Contractor's failure to complete any construction work in accordance with the terms of the construction contract and to remedy any defects or damages and problems in respect of any other liabilities of the Contractor to the Owner.⁵ Although the Contractor agrees with the Owner about the Retention Money, many Contractors propose to provide the Retention Money Guarantee to the Owner instead of the Retention Money itself, in order to protect the Contractor's cash flow.

Parent Company Guarantee

In the event that the Contractor is a subsidiary or affiliate of another larger company, a group of companies, a joint venture or a consortium, the Owner may require the Contractor to provide a Parent Company Guarantee. In the Parent Company Guarantee, the Contractor's parent company, including the Contractor's shareholder or ultimate holding company, guarantees the due performance of all of the Contractor's obligations under the construction contract and agrees to indemnify the Owner in the case of the Contractor's non-performance.⁶

³ Ellos Baker and others, *Supra* note 1, at 389.

⁴ The Office of Prime Minister, "Letter Number NorRor (KorWorPor) 1202/Vor 112 Examples of Bid Documents for Sale and Service Contracts, Letter of Guarantee, Material Accounts and Equipment Lists," 1 April B.E. 2535, 4-49.

⁵ Ellos Baker and others, *Supra* note 1, at 393.

⁶ Ellos Baker and others, *Supra* note 1, at 393.

2.2 Principles of Guarantee under the Construction Contract

There are various forms of the Third Party Guarantees under the construction contract for large projects, each form is used for specified propose. However, the principle of each form is not different. The followings are the brief summary of the key co-principles of the Third Party Guarantee under the construction contract.

Parties to the Third Party Guarantee

The parties to the Third Party Guarantee shall consist of a guarantor, a principal and a beneficiary. The guarantor is the person who agrees to guarantee to pay to the Owner, as a beneficiary, if the Contractor, as a principal, fails to perform his obligation and to act in accordance with the construction contract.⁷

The Statue of Guarantor

The guarantor under many forms of the Third Party Guarantee, for instance, letter of guarantee (Performance Security)⁸ and Parent Company Guarantee⁹ agree to be jointly liable with the Contractor as the primary obligor.

Payment Condition

The guarantor to the Third Party Guarantee agrees unconditionally to guarantee to pay to the Owner on their first demand or after the receipt of a written request from the Owner.¹⁰

Extension of Time

The guarantor agrees to give the advance consent to grant a time extension of the guarantee to the Owner.¹¹

⁷ The Office of Prime Minister, *Supra* note 4, at 4-47 – 4-51.

⁸ The Office of Prime Minister, *Supra* note 4, at 4-47.

⁹ FIDIC, **FIDIC® Condition of Contract for Construction**, 1st Edition (Switzerland: FIDIC, 1999), 23.

¹⁰ The Office of Prime Minister, *Supra* note 4, at 4-47 – 4-51.

¹¹ The Office of Prime Minister, *Supra* note 4, at 4-47 – 4-51.

3. THE AMENDMENT OF SURETYSHIP AND THE IMPACT TO THE THIRD PARTY GUARANTEE UNDER THE CONSTRUCTION CONTRACT FOR LARGE PROJECTS

Because Thailand does not have specific law concerning Third Party Guarantee or independent guarantee, the closest principle that can be applicable is the principle of suretyship under the CCC.

3.1 The Amendments to the Principle of Suretyship

The principle of suretyship under the CCC is one of the principles that had not been amended since Book 3 of the CCC was firstly promulgated in B.E. 2471. However, in B.E. 2557, the first amendment to the principle of suretyship was introduced by the Civil and Commercial Code Amendment Act, (No.20), B.E. 2557 (“CCC Amendment No.20”) which was announced in the Royal Gazette on 13 November B.E. 2557 and became effective on 11 February B.E. 2558. Consequently, the Civil and Commercial Code Amendment Act, (No.21), B.E. 2558 (“CCC Amendment No.21”) was proclaimed in the Royal Gazette on 14 July B.E. 2558 and became effective on 15 July B.E. 2558. The followings are the brief summary of the amended principle of suretyship under the CCC.

(1) As most of the creditors generally request the surety to be jointly liable with the debtor.¹² In order to protect the surety from such agreement, the CCC Amendment No.20 prohibits an agreement which the surety agrees to be jointly liable with the debtor.¹³ However, the exception thereof was added by the CCC Amendment No.21. Therefore, to the extent that the surety is the juristic person, even the provision of the amended principle of suretyship which specified that the surety agree to be jointly liable with the debtor is void, such provision shall be enforceable.¹⁴

¹² Suda Visrutpich. *“Explanation of Laws of Suretyship and Mortgage Amended by the Civil and Commercial Code Amendment Act, No. 20, B.E. 2557”* **Memory Book of Khun Chumpol Juntratip** (December 19, 2014): 285-286.

¹³ Section 681/1 of the CCC that was amended by the CCC amendment No.20.

¹⁴ Section 681/1 paragraph 1 and 2 of the CCC that was amended by the CCC Amendment No.20 and the CCC Amendment No.21.

(2) Under the ordinary principle of suretyship, the creditor shall be entitled to claim against the surety whenever the debtor is in default.¹⁵ In practice, some creditors intend not to notify the surety and execute their right to claim against the surety. This will cause the interest, compensation, or charge (if any) to grow.¹⁶ Hence, in order to protect the surety from this unfair practice of the creditor, the CCC Amendment No.20 and No.21 added the mechanism concerning the notification by the creditor in such event.

In the event that the debtor is in default, the creditor shall notify such default to the surety within sixty days from the default date. Before such notification has been received by the surety, the creditor shall not be entitled to claim against the surety.¹⁷ If the creditor fails to notify the surety within sixty days from the default date, the surety shall be released from an interest, any compensations, or charges which are occurred after such period of time.¹⁸

(3) The underlying transaction and the suretyship are separate transactions. Therefore, if the creditor agrees to reduce a secured amount under the underlying transaction to the debtor, and the creditor or the debtor does not inform the surety, the surety shall not be aware of such information.¹⁹ Hence, the surety, who is a secondary debtor, shall be liable to the creditor in the full amount of the secured obligation, while the debtor shall be liable to the creditor only in the reduced amount. In order to protect the surety from such unfair practice, the CCC Amendment No.20 and No.21 added the mechanism concerning the notification by the creditor to the surety in such event.²⁰

In the event that the creditor and the debtor have an agreement to reduce the secured amount, the creditor shall notify such agreement to the surety within sixty days from the date of

¹⁵ Section 686 of the CCC.

¹⁶ Suda Visrutipich, *Supra* note 12, at 292-293.

¹⁷ Section 686 paragraph 1 of the CCC that was amended by the CCC Amendment No.20.

¹⁸ Section 686 paragraph 2 of the CCC that was amended by the CCC Amendment No.20.

¹⁹ Suda Visrutipich, *Supra* note 12, at 296-297.

²⁰ Section 691 paragraph 1 of the CCC that was amended by the CCC Amendment No.21.

agreement. If (i) the debtor pays the remained secured amount in whole, or (ii) the debtor pays the reduced secured amount in part and the surety has paid for the remaining, or (iii) the surety has paid the reduced secured amount in whole, the surety shall be discharged.²¹

(4) Under the principle of suretyship, to the extent that the secured obligation is to be performed at a definite time, if the creditor grants a time extension of such obligation without the consent of the surety, the surety shall be discharged. However, the surety is allowed to give advance consent to the creditor. In practice, most of the creditors will require the surety to give advance consent on such extension of time by the creditor, which results in the extension of period of suretyship and the surety shall also be liable for any interest, compensation and charges, which are occurred during such extension period.²² To protect the surety from such unfair practice, the CCC Amendment No. 20 prohibits the creditor from requesting advance consent on such extension of time.²³ However, the exception thereof was added by the CCC Amendment No.21. Therefore, if the surety is a financial institution or person who undertakes suretyship business for remuneration, such advance consent on time extension shall be enforceable.

3.2 The Key Impacts of the Amended Principle of Suretyship to the Third Party Guarantees under the Construction Contract

As the significant principles of suretyship were amended, hence, the amendments of the principles of suretyship cause significant effects to the provisions of the Third Party Guarantee under the construction contract for large projects.

Joint Liability of Guarantor

The amended principle of suretyship prohibits the surety from agreeing to be jointly liable with the debtor as the

²¹ *Id.*

²² Suda Visrutpich, *Supra* note 12, at 298-299.

²³ Section 700 paragraph 2 to the CCC that was amended by the CCC Amendment No.20.

primary obligor, unless the surety is a juristic person.²⁴ Most of the Third Party Guarantee forms under the construction contract are issued by financial institutions or juristic persons, which are not subject to this prohibition under the amended principle of suretyship. However, one of the Third Party Guarantee forms, which are the Parent Company Guarantee, may be affected. Only the event that Parent Company Guarantee is given by shareholders of the Contractor, if the shareholder is not a juristic person, such shareholder is then prohibited from being jointly liable with the Contractor. Thus, such shareholder, as guarantor, will have the following refusal rights: (i) the right to request the Owner to demand performance from the Contractor first,²⁵ (ii) the right to request the Owner to make an execution against the property of the Contractor first,²⁶ and (iii) the right to request the Owner to make an execution against the real security of the Contractor which the creditor has already held first.²⁷

Extension of Time

During the execution of the construction work, if the Contractor fails to complete any part thereof within the specified time, the Owner shall be entitled to claim liquidated damages, as specified in the construction contract. However, the Owner sometimes agrees to extend such specified time for the Contractor due to various reasons. The guarantor shall be discharged if the guarantor does not give the consent to grant such time extension to the Owner.²⁸ Thus, in order to ensure that the guarantor shall not be discharged, advance consent from the guarantor must be obtained. Under the amended principle of suretyship, an agreement that the guarantor has made in advance as regards his consent to the extension of time before the Owner grants a time extension to the Contractor is

²⁴ Section 681/1 paragraph 2 to the CCC that was amended by the CCC Amendment No.21.

²⁵ Section 688 of the CCC.

²⁶ Section 689 of the CCC.

²⁷ Section 690 of the CCC.

²⁸ Section 700 paragraph 1 of the CCC.

not enforceable, unless the guarantor is a financial institution or a person undertaking suretyship business for remuneration.²⁹

Even though, most of the Third Party Guarantee forms under the construction contract are issued by financial institution, one of the Third Party Guarantee forms, which are the Parent Company Guarantee, shall be affected as a person who issues this Third Party Guarantee, is mostly not a financial institution or a person in suretyship business. Hence, to the extent that the Owner requires the Contractor to provide a Parent Company Guarantee, the Owner must request consent from the guarantor before granting the Contractor time extension.

Default of the Contractor

According to the amended principle of suretyship, when the Contractor is in default, the Owner has a duty to notify all guarantors under any Third Party Guarantees of the contractor contract within sixty days from the default date. If the Owner fails to notify any guarantor within the said period, such guarantor shall be discharged from the interest and reimbursement including any charges which occurred after the said period.³⁰

This new principle generates more burdens to the Owner who receives a Third Party Guarantee from the Contractor, which may be summarized as follows:

(1) It is rather difficult to consider whether there is any event of default by the Contractor under the construction contract for large projects. Therefore, the period of sixty days for the default date may not enough to consider such issue.

(2) As the amended principle of suretyship does not provide any detail on the commencement of such period of sixty day. For example, in the event that the Owner considers and notifies the Contractor that he is in default, if the Contractor denies such default, there must be dispute settlement. After the completion of the settlement of dispute, if the period of dispute settlement consumes more than sixty days, whether the right of the Owner to claim

²⁹ Section 700 paragraph 3 to the CCC that was amended by the CCC Amendment No.21.

³⁰ Section 686 to the CCC that was amended by the CCC Amendment No.20.

interest, compensation, or charges occurred after the period of sixty day will be nullified. Whether, when, the period of sixty days starts, either on actual default date or on default date, as agreed by the Owner and the Contractor, is still an issue which requires further clarification.

(3) In the event of delay in performance of the Contractor resulting in default by the Contractor, the Owner shall be entitled to claim the liquidated damages for delay. In such case, the Owner shall notify the default to the guarantor. However, at the time of notification, the Owner has not known the exact amount of these liquidated damages. The amount of liquidated damages for delay increases daily and the exact amount will be finalized only when the delayed work is completed.³¹ Hence, the Owner can only specify in the notification to the guarantor that the Contractor is in default without giving the exact amount of liquidated damages for delay. In this situation, even the guarantor is liable to pay liquidated damages for delay under the amended principle, the guarantor cannot perform as he also does not know the exact amount thereof. Furthermore, the amended principle does not expressly specify whether or not the Owner has to notify the guarantor the exact amount of liquidated damages for delay again once the work is completed. If the Owner does not re-notify the guarantor such exact amount, whether or not, the guarantor will not be able to execute his right under this amended principle.

(4) In some construction contracts, the Contractor has to provide four types of the Third Party Guarantee to the Owner. When the Contractor is in default, the Owner has to send at least four notifications to all guarantors. Hence, additional monitoring procedure in order to notify the default to the guarantors is required and the Owner needs more manpower to observe and comply with the procedures.³² In addition, because the Third Party Guarantee under the construction contract is a guarantee to the future obligation

³¹ Joseph A. Huse, *Supra* note 2, at 63.

³² Panita Nguansiri, "Problems with the Suretyship Provisions in the Civil and Commercial Code of Thailand Amendment Act (No.20) B.E. 2557 (2015)" (Master's Individual Research Paper, Faculty of Law, Chulalongkorn University, 2014), 38.

within the period of the construction, if the Contractor is in default during the period of construction more than one time, the Owner has to notify any and all default to all guarantors under the construction contract, whether the Owner wishes to claim from such Third Party Guarantees or not. This notifying duty put more burden and costs to the Owner.

Reduction of the Debt for the Contractor

In the event that the Owner has an agreement to reduce the amount of secured debt with the Contractor, under the amended principle of suretyship, in the Owner shall notify such agreement to the guarantor within sixty days from the agreement date.³³

Under the construction contract for large projects, an arrangement on the waiver or reduction of the liquidated damages is not made due to mere kindness of the Owner. Instead, it is initiated because it is more beneficial to the Owner and the Contractor, or because it is easier for the Owner to manage the construction project, or because the Owner has actually contributed in causing the default by the Contractor. For examples, the Owner requests the Contractor to put additional effort to speed up the delay part of construction work by increasing manpower or working hours and the Contractor, in exchange, requests the Owner to waive or reduce the liquidated damages.³⁴ As a result, the Owner and the Contractor may not wish to notify this agreement to any third party. Furthermore, because of additional duty to notify all guarantors, the Owner and the Contractor are even more prone to not make any debt reduction, but instead make a side arrangement between each other.

4. MITIGATION OF THE IMPACTS OF THE AMENDMENT OF PRINCIPLE OF SURETYSHIP BY USING THE THIRD PARTY GUARANTEE UNDER THE ISP 98, AND THE CONVENTION

To consider the possibility of using the standby letter of credit in accordance with the ISP98 and the Undertaking in

³³ Section 691 paragraph 1 to the CCC that was amended by the CCC Amendment No.21.

³⁴ See Joseph A. Huse, *Supra* note 2, at 9-16.

accordance with the Convention in order to mitigate the impacts of the amended principle of suretyship to the Third Party Guarantee, each impact thereof was compared with the use of the ISP 98 and the Convention as follows:

Joint Liability of Guarantor

As the standby letter of credit covered by the ISP 98³⁵ and the Undertaking covered by the Convention³⁶ are independent from the construction contract, both of the Third Party Guarantees covered by the ISP 98 and the Convention do not prohibit an agreement which binds the issuer or guarantor to be jointly liable with the Contractor.

Thus, an agreement, which binds the issuer or guarantor to be jointly liable with the Contractor, that is specified in standby letter of credit covered by the ISP 98 and the Undertaking covered by the Convention is enforceable, while such agreement is enforceable under the Third Party Guarantee governed by the CCC only to the extent that guarantor is juristic person.

Extension of Time

As the standby letter of credit covered by the ISP 98³⁷ and the Undertaking covered by the Convention³⁸ are independent from the construction contract, so, if the Owner and the Contractor have an agreement to extend the time for any performance under the construction contract, the issuer or guarantor will not be discharged from the standby letter of credit and the Undertaking.

Thus, to the extent that the Owner grants an extension of time for the secured obligation, the guarantor to the Third Party Guarantee governed by the CCC will be discharged, unless the guarantor agrees with such extension of time on time to time basis, while the issuer to the standby letter of credit or the guarantor or issuer to the Undertaking will not be discharged whether such person agrees with such extension of time.

³⁵ Rule 1.06 (c) of the ISP 98.

³⁶ Article 3 (a) and (b) of the Convention.

³⁷ Rule 1.06 (c) of the ISP 98.

³⁸ Article 3 (a) and (b) of the Convention.

Default of the Contractor

As the standby letter of credit covered by the ISP 98³⁹ and the Undertaking covered by the Convention⁴⁰ are independent from the construction contract, in the event that the Contractor is in default, the Owner to the standby letter of credit and the Undertaking shall not be requested to notify such default to the issuer or guarantor.

Thus, to the extent that the Contractor is in default under the construction contract, the Owner to the Third Party Guarantee shall notify the guarantor within sixty day from the date of default, while the Owner to the standby letter of credit or the Undertaking shall not be requested to notify such default to the issuer to the standby letter of credit or the guarantor or issuer to the Undertaking and shall not subject to the consequential effect, as specified in the amended principle of suretyship under the CCC.

Reduction of the Debt for the Contractor

As the standby letter of credit covered by the ISP 98⁴¹ and the Undertaking covered by the Convention⁴² are independent from the construction contract, in the event that the Owner and the Contractor have an agreement to reduce the amount of secured debt, the Owner to the standby letter of credit and the Undertaking shall not be requested to notify such agreement to the issuer or guarantor.

Thus, to the extent that the Owner and the Contractor have agreed to reduce the amount of secured debt under the construction contract, the Owner to the Third Party Guarantee governed by the CCC shall notify such agreement to the guarantor within sixty day, while the Owner to the standby letter of credit or the Undertaking shall not be requested to notify such agreement to the issuer to the standby letter of credit or the guarantor or issuer to the Undertaking and shall not be subject to the consequential effect, as specified in the amended principle of suretyship under the CCC.

5. CONCLUSION

³⁹ Rule 1.06 (c) of the ISP 98.

⁴⁰ Article 3 (a) and (b) of the Convention.

⁴¹ Rule 1.06 (c) of the ISP 98.

⁴² Article 3 (a) and (b) of the Convention.

From the study, the significant impacts of the use of the amended principles of suretyship on the Third Party Guarantees under the construction contract for large projects can be mitigated by the use of the standby letter of credit covered by the ISP 98 and the Undertaking covered by the Convention, but, either of them also has an issue concerning the application mechanism under Thai Laws.

The standby letter of credit covered by the ISP 98 is only an international rule of practice, not international law. The ISP 98 therefore binds the party to the standby letter of credit as the provision of contract, not as binding international law. Thus, if Thai Court considers that some provision of the ISP 98 is contrary to the public order or good morals, such provision shall be void.⁴³

Meanwhile, the application of the Undertaking under the Convention shall be allowed only when the place of business of the guarantor or issuer of the Underlying is in the Contracting State and the Undertaking shall be used solely in international transactions where any two of the guarantor/issuer, the Contractor or the Owner are in different states.

Hence, if the Owner and the Contractor wish to use the standby letters of credit cover by the ISP 98 or the independent guarantees or the stand-by letters of credit covered by the Convention to mitigate the effect from the amendment of the principle of guarantee to the Third Party Guarantee under the construction contract for large projects, the Owner and the Contractor shall take the foregoing issues into account and apply suitable Third Party Guarantee covered by the ISP 98 or the Convention for their situation.

⁴³ Section 150 of the CCC.

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