

# **Statutory guaranty**

## **under the Czech Commercial Code**

Guaranty is a relationship between creditor and guarantor under which the latter is obliged to satisfy creditor if the debtor fails to perform a specific obligation. Apart from lien, guaranty is the most common method used to secure obligations. Guaranty usually arises from the contract or guarantor's declaration (thus called voluntary guaranty). There are however many provisions in Commercial Code which set up the guaranty irrespective of the will of parties concerned (statutory guaranty). The aim of the thesis is to provide an overview of all the cases of statutory guaranty which are applied under the Czech Commercial Code.

The first chapter deals with general questions related to the guaranty. In spite of the fact that the statutory guaranty comes into existence due to the special Commercial Code's provisions, it may be governed by both Civil and Commercial Code. In this respect the only relevant and decisive factor is the character of the main obligation which is secured by the guaranty. Guaranty is accesoric relationship: it depends on the main obligation and it usually expires upon extinguishment of the obligation it secures. Guaranty may secure only a valid obligation of the debtor but an obligation which will arise in the future or an conditional obligation can be secured as well. Among the main features of the guaranty pertains its subsidiarity: the creditor has the right to seek performance of an obligation from the guarantor only when the debtor failed to perform his debt within appropriate time after the creditor invited him to do so. This means that the guarantor is bound to fulfil the obligation only after the debtor failed to do so. Another two subchapters look at the guarantor-creditor relationship and that between the guarantor and the debtor. Special focus is devoted to the moment when the guarantor fulfils the debtor's debt. In this case the guarantor acquires against the debtor new right and the debtor owes a duty to him rather than to the creditor. The obligation may be secured by more than one person; then all the guarantors are obliged jointly and severally to fulfil the debt. The problem of the expiration of the guaranty is

another issue which is examined in the first chapter. Eventually one should bear in mind that rights arising from guaranty relationship are subject to the statute of limitations.

Chapter two focuses on the statutory guaranty that relates to the investment contributions and their management and payment before incorporation. When the business share is transferred, the transferee becomes a guarantor securing obligations that the transferor remains liable for. The member of the company who assigns a claim to the company as his investment contribution is bound to satisfy the company unless the debtor fulfils his debt. Manager of contributions whose statement shows a total of paid-up investment contributions greater than that actually paid up becomes the guarantor for the company's debts up to the amount of the difference for the period of five years from the date of company's incorporation. If the company is not incorporated, the manager of contributions has to return contributions to promoters; promoters of the company act as guarantors for the manager's obligation.

Chapter three concentrates on the statutory guaranty of the members of the companies. The first subchapter deals with questions common to all the forms of companies, other subchapters are devoted to particular forms of companies. Partners of the general partnership bear unlimited joint and several liability (as guarantors) for the partnership's debts. In the limited partnership there are two types of partners: the guaranty of the general partners for the partnership's debts is unlimited whilst limited partners are liable (as guarantors) for the partnership's obligations up to the amount of the unpaid parts of their contributions as entered into Commercial Register. Members of the limited liability company are jointly and severally liable (as guarantors) for their company's obligations up to the total of unpaid portions of their investment contributions according to the relevant entry in the Commercial Code. Shareholders of the joint-stock company as well as the members of the Co-operative do not act as guaranties at all.

The fourth chapter analyzes the statutory guaranty of the members of companies' bodies. In this case the statutory guaranty represents some kind of sanction as its creation depends on the breach of the duties by these persons. In fact it is one of the instruments by which the commercial law tries to resolve problems resulting from the so-called separation of ownership and control. If the conditions laid down by the Commercial Code are met, the burden of the guaranty is born by executive officers and members of the supervisory board of the limited liability company, members of the board of directors and members of the

supervisory board of the joint-stock company as well as by members of the managing board and members of the auditing commission of the Co-operative. Finally the brief information on the statutory guaranty of the so-called shadow managers is provided.

The last chapter is subdivided into seven subchapters each of which deals with different type of contract. Under some circumstances the Commercial Code sets up the statutory guaranty of one of the parties to a contract. The first case of the statutory guaranty stems from the fact that there are some obligations that are part of the business share. When the share is transferred, these obligations are transferred as well and the former debtor (the transferor) acts as the guaranty for them. Similar situation occurs upon the sale of enterprise. Obligations relating to the enterprise are transferred together with the enterprise and thus the debtor is changed. In order to protect creditors, the statutory guaranty of the former debtor (transferor) is created. The same reason led the law-maker to set up the statutory guaranty of the lessor of the enterprise for the debts which pertain to the leased enterprise. Under the commission agent contract the commission agent arranges a certain business matter (e. g. concludes a contract) for the principal. The principal may demand from the commission agent performance of a third party's obligation if the commission agent has violated the principal's orders regarding the party with which the respective contract was to have been concluded. In such case provisions on guaranty apply *mutatis mutandis*. As to the contract on the carriage of things, the consignee assumes the guarantee for payment of the carrier's claims against the consignor as soon as he obtains the consignment. The silent partnership contract is another type of contract where we can meet the statutory guaranty: under some circumstances the silent partner is liable (as guarantor) for the entrepreneur's debts. The last subchapter is devoted to the statutory guaranty of the parties to a multilateral barter transactions.

### **Keywords**

statutory guaranty, commercial law, company law, contract law