ARGON LEGAL

BANK GUARANTEE
SECURING LEASE AGREEMENT

A bank guarantee is a special type of banking service (an agreement concluded only with a bank) that is used to secure receivables. It also applies to lease agreements.

The mechanism of a bank guarantee relies on a construction that a bank - as a guarantor - undertakes in respect of a debtor (tenant), to pay to the debtor's counterparty (i.e. the landlord) the guarantee amount, if the debtor fails to perform its specified obligation towards the landlord.

The condition for payment of funds, and therefore the effectiveness of this form of security, is the submission of a demand for payment of a specific content and in the specific form, and possibly the fulfilment of other formal conditions.

CHAPTERS

What should a bank guarantee look like to work reliably?

In order for a bank guarantee to provide a reliable and effective security for payment, it is worth taking care of regulating several issues in the lease agreement itself.

First of all, it is a good practice to include a template of a bank guarantee as a schedule to the lease agreement. The provided guarantees should be in compliance with this schedule. Unification of the guarantees' wording, which are provided by tenants, shortens the time of their verification and the time needed for preparation of demands for payment from bank guarantees. Not every template being used by a bank or a debtor secures the interests of a beneficiary of the guarantee.

A template should provide that in the guarantee:

- **details of the bank, the tenant and the landlord are correct** – errors in this regard may render it impossible for the landlord to use the guarantee;
- **the basic relationship that the guarantee** is intended to secure (i.e. the lease agreement), and the guarantee amount, the validity period of the guarantee, as well as the time for payment are correctly described;

- **the form** (preferably indicating several alternative options) **of submitting a payment demand and the way of confirming the originality of the signatures of the landlord's representatives are regulated** – the effectiveness and quickness of using the bank guarantee depends on the indicated form (written form, written form with a notarized signature, SWIFT message, etc.). A payment demand is considered to have been submitted at the time of its receipt by the bank, and each of the available forms has its limitations that should be considered. For example, choosing only the written form (and the delivery by post to the bank's address) may make it difficult to submit the payment demand on time, especially if the need to use the security arises shortly before the expiry date of the guarantee. Providing the payment demand in the form a message in SWIFT system might be used as a complementation in this respect, although using SWIFT system is also limited by the bank's working hours and possible system malfunctions;
- **the content of the payment demand is regulated** – in the practice of banks, most often only a statement that the tenant has not fulfilled its obligations under the lease agreement is required. However, there are provisions that may limit the manner or scope of the breach of agreement in the payment demand, which triggers limitation of the obligations, the performance of which, has actually been secured. For example, if the wording of the bank guarantee indicates that it can be used only in the event the tenant breaches its obligation to pay (or a pecuniary obligation), then there will be a problem with transferring the funds from the bank guarantee to a deposit (cash deposit) in the event that the tenant fails to provide a new guarantee just before its expiry period;

- **the bank guarantee is unconditional** – the obligation to pay a given amount by the bank should depend only on the correct submission of the payment demand. The payment of funds from the guarantee should not require proving of any additional circumstances (e.g. demand the tenant to pay) or additional actions of the landlord (such as presenting the bank with additional documents, e.g. lease agreement, invoices, etc.). The bank should not examine the basic relationship (i.e. the lease agreement) and the claim, neither in principle nor in amount. It should be mentioned that banks do offer conditional bank guarantees, but their attractiveness to the landlord as a collateral is relatively lower;
- **the bank guarantee is irrevocable and payable on first demand** – these clauses affect the so-called non-accessory feature of the bank guarantee, i.e. its independence from the basic relationship (discussed below);
- **the bank guarantee ensures the unconditional transferability of rights under the bank guarantee** – the reservation of this feature secures the possibility of selling the real estate being the subject of the lease during the guarantee period;
- **the bank guarantee is independent of subsequent arrangements or disputes between the parties of the lease agreement** – which means, inter alia, that the funds cannot be deposited by the bank to the court deposit;
- **it is indicated that Polish law and the jurisdiction of Polish courts apply** – this element is particularly important in a situation where the guarantor is a foreign bank that does not have a branch in Poland;
- **it does not contain any clauses excluding the bank's obligation to pay funds** in the event of bankruptcy or restructuring of the tenant.

Secondly, the provision obliging the tenant to provide a bank guarantee should also indicate the obligation to increase the guarantee amount appropriately – including amendments of fees amount (e.g. in the case of rent indexation) and extension (if the bank guarantee is granted for a period shorter than the lease period).

Thirdly, it is worth taking care of the mechanism disciplining the tenant to deliver and extend the bank guarantee. For this purpose, a contractual penalty (payable for each day of delay) and, in extreme cases, termination of the lease agreement are suitable.

Finally, it should be remembered that according to the current practice of banks, the guarantee is usually issued for a period of one year. Therefore, it does not cover the entire lease period. In order to protect oneself in the event of failure to provide a new guarantee (or an annex extending its validity) by the tenant, it is worth regulating in the agreement itself the possibility of using the bank guarantee by the landlord and transferring the funds paid by the bank to the cash deposit. Thanks to this, payments under the agreement will be secured in the event of the tenant's inaction.

Why is it worth using a bank guarantee in lease agreements?

A bank guarantee is not the only mechanism to secure landlord's claims. There are many other tools at the disposal of the parties to the lease agreement, such as cash deposit, pledge, voluntary submission to enforcement or promissory note. So why is it worth using a bank guarantee? First of all, due to the fact that this security is characterized by the so-called non-

accessory feature of the legal relationship (if so decided) and the separation of the payment from the financial situation of the debtor (tenant). A bank guarantee is also a beneficial solution for the tenant.

Non-accessory nature of the bank guarantee

Granting of an unconditional, irrevocable, payable on first demand bank guarantee creates a new legal relationship between the bank and the beneficiary of the guarantee – the landlord. The tenant, despite the fact that he is the bank's principal and bears the costs of granting the guarantee, is not a party to it. That relationship, as confirmed by the case-law, is separate and independent from the basic relationship secured by the guarantee (i.e. the lease agreement). As a result, disputes between the landlord and the tenant under the lease agreement do not affect the bank's obligation to pay the guarantee amount, provided that all formal conditions of the guarantee are met. Thus, the non- accessory nature of the bank guarantee protects the landlord against unjustified objections of the tenant as to the legitimacy or maturity of certain receivables that the landlord intends to settle with the guarantee amount. The above-mentioned advantages are dependent on the provision of a guarantee with certain characteristics – unconditional, irrevocable, payable on first demand, as there are also conditional (causal) guarantees in circulation – closely related to the basic relationship.

Independence from the tenant's financial situation

Unlike other collaterals on the commercial real estate market, such as a declaration of submission to enforcement, a promissory note or a pledge, a bank guarantee allows one to satisfy debts arising from a lease agreement from the assets of a third party - a bank. Such a structure means, that regardless of any financial problems of the tenant, there is a third entity that shall satisfy the landlord's claims. A bank guarantee is also a security that remains independent of the opening of restructuring or bankruptcy proceedings against the tenant (unless otherwise stipulated in the guarantee itself). This is justified because the landlord satisfies its claims from the bank's assets and not from the tenant's assets being subject to the protection provided for in these proceedings (more on this below).

Certainty of professional trading and benefits for the tenant

A bank guarantee is a product used on a large scale in professional trade. The entity that takes over the risk of improper performance of the lease agreement, including due to the deterioration of the tenant's financial situation, is a bank – a financial institution being subject to special regulations and supervision of state authorities, which significantly reduces the risk of non-satisfaction of receivables on the part of the landlord. In addition, the use of a

bank guarantee – as opposed to a cash deposit – means that the tenant is not obliged to immediately engage his own funds, which would be frozen for the lease period, i.e. usually for several or even more years.

To summarize – a bank guarantee has the advantages of a mortgage and pledge to the extent that it is covered by actual assets, but without the formalities associated with these collaterals or a long wait for them to be cashed in. It is not necessary to launch expensive and costly court proceedings to obtain funds to cover the debt. It also has the advantages of a deposit, while being a more beneficial solution for the tenant, who does not have to engage his own funds to secure the lease agreement. Obtaining funds from a bank guarantee is independent of any possible financial problems of the tenant and does not require formalized proceedings, as in the case of using a declaration of submission to enforcement or a promissory note. Therefore, the deadline for payment is independent of the delays that often occur in the courts and the deadlines for bailiff actions.

The obligation to provide a guarantee by the tenant and the contractual penalty

Securing a lease agreement by means of a bank guarantee presupposes that the tenant commissions the bank to grant a bank guarantee and delivers the guarantee document to the landlord. Failure to comply with these obligations should be associated with a specific contractual sanction for the tenant, so that there is a mechanism in place to discipline the tenant to perform them. In addition to the right to terminate a lease agreement with immediate effect, it is possible to oblige the tenant to provide a bank guarantee under the pain of paying a contractual penalty, even though this issue raises doubts in doctrine and case-law.

One of the doubts concerned the fact that the obligation to provide security to the landlord is not one of the essential benefits of the lease agreement, but only an ancillary ben[1]efit . It was resolved, inter alia, in the judgment of the Regional Court in Poznań of 26.10.2017, case no. XV Ca 956/17 (LEX no. 2488939), in which it was stated that:

"A contractual penalty may be imposed on the debtor's failure to perform or improper performance of a contractually specified obligation, which is not one of the basic, materially essential obligations (...)",

which view must be regarded as the prevailing line of case-law at the moment.[2]

1 See. Judgment of the Supreme Court of 19.12.2000, V CKN 171/00, LEX no. 52662, Judgment of the Supreme Court of 13.06.2008, I CSK 13/08, LEX no. 637699, Judgment of the Regional Court Warsaw-Praga in Warsaw of 26.03.2015, II C 1421/14, LEX no. 1841867, Judgment of the Regional Court in Łomża of 22.09.2016, I Ca 293/16, LEX no. 2139999.

[2] Cf. Resolution of the Supreme Court of 9 December 2021, III CZP 26/21, OSNC 2022/7-8/70, LEX no. 3268887, Judgment of the Regional Court in Łódź of 10.10.2016, XIII Ga 241/16, LEX no. 2146617, Judgment of the District Court for Wrocław-Fabryczna in Wrocław of 4.02.2016, IV GC 1144/11, LEX no. 2009947, Judgment of the Supreme Court of 28.05.2014, I CSK 345/13, LEX No. 1532768, etc.

Another, more serious doubt arose from the fact that, in the light of Article 483 of the Civil Code, a contractual penalty may be reserved only in the event of non-performance or improper performance of non-pecuniary obligations. Otherwise, the contractual penalty will not be validly stipulated. The source of the problem is the nature of the tenant's obligation to provide a bank guarantee, which has not been unequivocally settled by the courts.

The guarantee agreement obligates the bank to pay a certain amount to the beneficiary, so it undoubtedly involves a pecuniary obligation. However, it cannot be overlooked that it is the bank, not the tenant, who is obliged to pay. According to the case-law, the payment of funds under the guarantee is the bank's own obligation, and is not the obligation of the tenant, which the bank performs on its behalf, even though the settlement of the financial profit takes place between the parties to the basic relationship[3]. In the lease agreement, the tenant undertakes to create a specific obligation between the bank and the landlord and to provide a document with a specific content; such an obligation can hardly be characterized as pecuniary.

Notwithstanding the above, some courts support the position that the provision of a bank guarantee is a pecuniary obligation, so a contractual penalty cannot be validly stipulated – among others, this is what the Regional Court in Wrocław adopted in its judgment of 31 January 2022, case no. X GC 638/21. However, this decision was not supported by the court of second instance, which unequivocally stated the validity of the contractual penalty in this case.

According to the judgment of the Court of Appeal in Wrocław of 28 October 2022, case no.I AGa 118/22:

According to the judgment of the Court of Appeal in Wrocław of 28 October 2022, case no.I AGa 118/22: Neither the content of the demand addressed to the defendant related to the establishment of a bank guarantee, nor the bank guarantee itself shows that the debtor - defendant was to perform a pecuniary obligation. On the contrary, the pecuniary obligation, if ever performed, was to be performed by the bank, not by the defendant. ***Therefore, the stipulation of a contractual penalty in the event of a failure to submit a bank guarantee cannot be equated with the defendant's failure to perform a pecuniary obligation, because in the light of Article 81 section (1) of the Banking Law, it was not the defendant who was obliged to provide the payment, but the bank.***

The above ruling provides an unambiguous answer to the existing doubts and convinces to the application of contractual penalties in the case of the tenant's failure to deliver a guarantee, which additionally secures the interest of landlords.

3 Judgement of the Administrative Court in Poznań of 30.04.2021, I AGa 222/20, LEX no. 3197232

Can I always use a bank guarantee?

Bank guarantee before a claim under the lease agreement arises

The relationship between the bank's obligation to pay a certain amount and the moment when the claim under the lease agreement arises (i.e. maturity of the obligation) depends to a large extent on the wording of the guarantee itself.

The guarantee agreement specifies the entry into force and expiration date of the rights under the guarantee, i.e. the period during which it is possible to submit an effective demand for payment. This period does not necessarily coincide with the maturity period of all receivables under the lease agreement.

In addition, the guarantee may make the payment of the guarantee amount dependent on:

- **condition** – e.g. the landlord provides evidence of the claim becoming due in a certain amount (such provisions should be avoided from the landlord's point of view) – in such a situation, the demand for payment submitted before the claim arises will be ineffective,
- **a statement in the demand for payment** that the tenant's receivables are due and have not been fulfilled by the tenant - in such a situation, submitting of a demand for payment before the tenant's obligation is due, would imply the submission of a false statement.

It is, of course, possible to grant an unconditional guarantee agreement, which is independent and does not require the above formal requirements for the payment of the guarantee amount, and is so abstract (non-accessory) that the lack of maturity of the secured receivable does not affect the legitimacy of the demand for payment. It should be noted, however, that:

"If the basic relationship does not give rise to an obligation to perform, then in a situation where the creditor receives a guarantee amount from the guarantor, and then the guarantor obtains the equivalent of this amount from the principal of the guarantee, it should be considered that the transfer of assets, which occurred as a result of the above-mentioned events between the debtor and the creditor from the basic relationship, in fact, does not have legal justification. This means that the beneficiary of the guarantee has become enriched at the cost of the debtor and the latter has become impoverished. Such a situation may be assessed under Article 405 and subsequent of the Polish Civil code. This, of course, does not preclude grounding the debtor's claims under the basic relationship on the regime of a contractual liability for damages (compare Civil Code Article 414), but in such a situation other circumstances need to be demonstrated, as the premises for ex contractu liability are different."[4]

4 Judgement of the Administrative Court in Warsaw of 22.10.2020, VII AGa 2220/18, LEX no. 3184240.

Thus, the settlement of the amount obtained from the bank guarantee with non due claims is subject to the risk of liability on the grounds indicated above. In practice, however, the guarantee is most often granted in the event of non-performance of a due obligation.

Bank guarantee after expiry of the lease agreement

The expiry of the lease agreement, as well as the moment when the claim arises under it, affects the possibility of using the bank guarantee only to the extent that the wording of the guarantee establishes a condition or makes the content of the demand for payment dependent on the duration of the lease relationship. A bank guarantee formed as an independent (non-accessory) relationship is the source of the bank's liability, which remains independent of the expiry of the lease agreement – as long as the formal conditions for submitting a demand for payment are met, the bank is obliged to pay the guarantee amount to the landlord.

Moreover, the Supreme Court points out that even:

"(...) the possible invalidity of the basic agreement or the withdrawal from it by one of the parties does not affect the existence of a valid obligation of the guarantor towards the beneficiary*, resulting from the guarantee agreement (...), because the guarantor's liability is not compensatory in nature, but is expressed in the obligation to pay up to the amount agreed in the guarantee agreement, the so-called guarantee amount (judgment of the Supreme Court of 4 October 1995, II CRN 123/94, OSNC 1996/2/29), in the event that the beneficiary submits a payment demand to the guarantor that meets the requirements set out in the guarantee agreement".*[5]

Regardless of the expiry of the lease agreement, the banking law also provides that the claim under the bank guarantee is due, even if the specific obligation to which the guarantee relates to, has already expired[6].

According to some jurisprudence, the impact of the basic relationship on a guarantee, if it is not regulated directly in the bank guarantee, boils down to considering the application of the construction of abuse of subjective rights (Art. 5 of the Civil Code). So far, it has been applied, for example, in the following cases:

"a demand for payment under a guarantee securing the repayment of a loan when the loan has not been paid, an extension of the scope of the guarantee or a situation in which the beneficiary releases the debtor from the debt and then demands payment of the guarantee amount".[7]

At present, however, the case-law is moving towards strengthening the protection of the non-accessory nature of guarantees. In particular, the Supreme Court expressed the view that the abstract, autonomous nature of the guarantee agreement excludes the possibility of infringement of a subjective right by the beneficiary by pursuing claims under the guarantee. In the event of the actual non-existence of the secured/settled receivables, or a dispute as to their amount, these issues, as related to the basic relationship, should be resolved on the basis

5 Judgment of the Supreme Court of 14.04.2016, II CSK 307/15, LEX no. 2224604.
6 See. Article 87 § 2 of the Civil Procedure Act.
7 M. Bieniak [in:] Banking Law. Commentary, eds. A. Mikos-Sitek, P. Zapadka, Warsaw 2022, art. 81.

of the basic relationship, and not within the framework of the relationship under the guarantee agreement.[8]

Bank guarantee when a tenant questions the receivable under a lease agreement

The Act does not limit the landlord as to the type of guarantee granted to him. As already mentioned, the guarantee may be conditional and causal in nature, but it is also possible to stipulate that the agreement is non-accessory, independent. In the second case, the landlord ensures that any allegations of the tenant regarding the lease agreement, the legitimacy of the receivables demanded or their amount do not suspend the possibility of using the guarantee. From the point of view of the landlord's interest, it is important that the guarantee provided by the tenant contains all the necessary clauses to ensure that it is non-accessory.

In accordance with the resolution of the Supreme Court of 16 April 1993 (ref. no. III CZP 16/93), composed of seven judges, having the force of a legal principle, a bank granting a bank guarantee bearing the clauses 'irrevocably', 'unconditionally' and 'on first demand' cannot effectively rely - in order to exclude or limit its obligation to pay - on allegations arising from the basic relationship (i.e. the lease agreement) in relation to which, the bank guarantee was issued.

The assessment of the obligation to pay out funds from a bank guarantee is made within the relationship of the guarantee agreement. A separate issue is the fact that the amount paid under the guarantee will be used to settle the liabilities under the lease agreement – therefore, the basis and legitimacy of the settlement of these liabilities will be assessed (and possibly questioned) only under the lease relationship, and not the guarantee relationship.[9]

Bank guarantee in the event of failure to extend its validity

It is worth remembering that upon the expiry of the validity period of the bank guarantee, the bank's obligation to pay the guarantee amount to the landlord expires. Currently, in the market reality, guarantees securing lease agreements are very rarely granted for a period longer than one year. This circumstance should be taken into account in lease agreements – by obliging the tenant to provide a new guarantee each time before the current one expires. What if the tenant ignores this obligation?

On the basis of freedom of contract, the landlord may also include a provision in the lease agreement indicating that if the tenant does not extend the validity period of the bank guarantee within the specified deadline, the landlord is entitled to pay out the guarantee amount and transfer it to the landlord's deposit account. In this way, the landlord can unilaterally "convert" the guarantee into a cash deposit securing the lease agreement.

The use of the above structure requires taking care of the proper wording of the bank guarantee. Regardless of its unconditional nature, the guarantee should cover improper

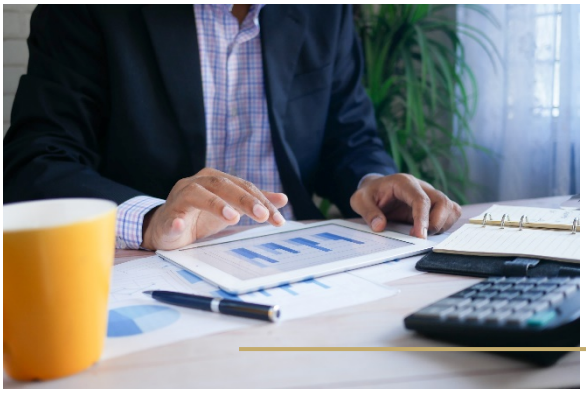
8 See. Judgment of the Supreme Court of 14.04.2016, II CSK 307/15, LEX no. 2224604.
9 See. Judgement of the Administrative Court in Warsaw of 22.10.2020, VII AGa 2220/18, LEX no. 3184240.

performance or non-performance of obligations under the lease agreement without limiting them to pecuniary obligations. According to the considerations presented above (point 2), the obligation to provide (and maintain, extend) a bank guarantee is of a non-pecuniary nature. Particular care should also be taken to determine the content of the demand for payment of the guarantee amount. The landlord will be satisfied with the reservation stating that the tenant has not properly performed its obligations (without narrowing it down to the issue of "pecuniary obligations"). However, the possible wording of the guarantee, according to which the payment of funds may be demanded in a situation where the tenant has not paid the amounts due under the lease agreement, may already limit the possibility of cashing in the funds from the bank guarantee and transferring them to a deposit account.

Bank guarantee in the event of bankruptcy and restructuring of the tenant

Another issue that raises doubts among landlords is the possibility of using a contractual security in the event of opening restructuring or bankruptcy proceedings against the tenant.

In this context, it should be remembered that a bank guarantee is a unilateral commitment by the bank with respect to the tenant's possible debt. The tenant is not a party to the above-mentioned relationship (guarantee agreement), so the declaration of its bankruptcy or the opening of restructuring proceedings against the tenant does not affect the landlord's ability to use the guarantee. In practice, there are guarantees that exclude the possibility of using them in the event of the tenant's bankruptcy. In order for the guarantee to be an effective security also in such a case, it is good to ensure that such a provision is removed from the content of the bank guarantee.



Similarly in the case of restructuring – currently none of the restructuring proceedings prevents the use of a bank guarantee. However, despite the fact that the prohibition on performing the services covered by the arrangement (“układ”), being in force from the date of opening the proceedings, applies to the debtor and not to its creditors, in practice supervisors, managers or debtors themselves quite often question the possibility of covering the so-called old debts (i.e. from before the opening of the restructuring proceedings) from a bank guarantee. However, the above is in no way justified in the light of the provisions of the restructuring law.

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