RUSSIAN DESK

Dear readers,

An independent guarantee is an effective and popular security mechanism, also in commercial financing and in complex investment and infrastructure projects. It is independent and can be used to fine-tune the obligations of the guarantor depending on particular circumstances of the project, which makes it possible to fully ensure that the creditor's interests are protected.

Before the reform of the Civil Code[1] only credit and insurance institutions could issue independent (bank) guarantees. After the reform, all commercial organisations can do so, which means, for example, that parent companies may issue guarantees to secure the obligations of their subsidiaries. In order to ensure uniform approaches to the new rules in respect of independent guarantees, the Supreme Court of Russia has defined important legal positions, aimed first and foremost at protecting the beneficiaries of such guarantees[2].

This Review will be of interest to CEOs, financial executives, and the specialists of legal departments.

Sincerely,

Alexander Bezborodov
Attorney-at-law | Partner

Clarifications on independent guarantees

DOES THE BENEFICIARY HAVE TO BE INDICATED IN THE GUARANTEE?

The new edition of the Russian Civil Code mandates that the beneficiary (the party to which payments are made under the guarantee) must be indicated in the guarantee. Otherwise the guarantee has no effect.

The Supreme Court explains: If the party in whose favour the independent guarantee is issued has been reliably established, the guarantee will have effect, even if the beneficiary is not explicitly indicated (for example, if the guarantor sends the guarantee to the beneficiary on its own). In this case the guarantor is required to make the payment, especially if it drafted the text of the guarantee itself (*contra proferentem*, i.e. "interpretation against the draftsman").

IS THERE ANY STATUTE OF LIMITATIONS WITH REGARD TO A CLAIM UNDER A GUARANTEE?

The beneficiary is obligated to present a claim for payment before the end of the valid term of the guarantee. Is it worth sending such a claim well in advance (taking into consideration the maximum period allowed for the guarantor to consider the claim)? Can the claim be sent by mail on the final day of the guarantee's term of validity?

There is no doubt that it is best if the claim is sent promptly in order to avoid any dispute regarding whether the deadline has

[1] On the basis of Federal Law No. 42-FZ dated 8 March 2015 "On Amending Part One of the Civil Code of the Russian Federation".

[2] Review of Court Practice in the Settlement of Disputes Related to the Application of Legislation on Independent Guarantees (approved by the Presidium of the Supreme Court of Russia on 5 June 2019).

BEITEN BURKHARDT

been met. The Supreme Court maintains the position that it is enough that the beneficiary sends the claim within the bounds of the term of validity of the guarantee; in other words, a claim sent by mail on the final day of this term will be considered to have been sent on time. The period allocated for the guarantor to consider the claim starts from the time when the claim is delivered. However, the guarantee itself may stipulate a different deadline for sending the claim.

AMENDMENT OF THE UNDERLYING CONTRACT DOES NOT AFFECT THE GUARANTEE

The guarantee does not depend on the underlying obligation which it was issued to secure (it is not accessory in nature). Therefore, a change in the terms of the contract does not affect the guarantor's obligations. Drawing on the example of two cases, the Supreme Court emphasizes that the amount of the guarantee can only be amended when this possibility is expressly set forth in its text. For instance, say the amount of the guarantee is set at 10% of the price of the supply contract. The parties subsequently change the volume of supplies and the total cost of the goods. The guarantor would still only be liable up to the limit of 10% of the previous price of the contract.

BANKRUPTCY OF THE GUARANTOR DOES NOT LEAD TO A TERMINATION OF THE OBLIGATIONS ARISING FROM THE GUARANTEE

If the guarantor is declared bankrupt during the effective term of the guarantee, this does not terminate its obligations. The beneficiary can demand enforcement under bankruptcy proceedings. The principal is also not released from the obligation to pay for the guarantor's services in issuing the guarantee. At the same time, however, an insolvency of the guarantor attests to a reduction in the security offered by the guarantee, which could serve as grounds for a recalculation of the agreed payment for the issue of the guarantee based on a court-appointed expert review.

PAYMENT TO A BAD-FAITH BENEFICIARY IS REFUSED

Sometimes a guarantee is issued in violation of the law (for example, when bank managers have agreed to provide a guarantee free of charge to secure the obligations of a company that they control, to the detriment of the bank's interests). Can the beneficiary receive compensation in this case? In the Supreme Court's opinion, this claim is invalid if the beneficiary engaged in negotiations with the managers and participated in the agreement to issue the guarantee, i.e. it knew about the violations.

If it can be proved beyond a reasonable doubt that the beneficiary accepted the due performance of the underlying obligation, it will also be inadmissible to file a claim under the guarantee. No one has the right to gain an advantage from their own misconduct.

THE PRINCIPAL CAN DEMAND THE RETURN OF PAYMENTS UNJUSTLY RECEIVED UNDER THE GUARANTEE FROM THE BENEFICIARY, BUT NOT FROM THE BANK

The rationale behind a guarantee lies in fact that the beneficiary can quickly receive compensation from the guarantor, thereby avoiding the objections of the principal based on the merits of the contract. If the terms of the guarantee are met, the bank is required to pay the guarantee amount, even if the bank knows about the dispute regarding the underlying contract between the beneficiary and the principal and has access to all documents.

The principal, from whom the bank has debited coverage under the guarantee in this case, cannot file a claim against the bank to recover unjust enrichment, but must instead demand it from the beneficiary.

Falk Tischendorf
Attorney-at-law | Partner
Head of Moscow office
BEITEN BURKHARDT Moscow
E-mail: Falk.Tischendorf@bblaw.com

Alexander Bezborodov
Attorney-at-law | Partner
BEITEN BURKHARDT Moscow
E-mail: Alexander.Bezborodov@bblaw.com

Sergey Morozov
Attorney-at-law | LL.M. | Associate
BEITEN BURKHARDT Moscow
E-mail: Sergey.Morozov@bblaw.com

Imprint

This publication is issued by
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Ganghoferstrasse 33 | D-80339 Munich
Registered under HR B 155350 at the Regional Court Munich/
VAT Reg. No.: DE811218811

For more information see:
https://www.beiten-burkhardt.com/en/imprint

EDITOR IN CHARGE
Alexander Bezborodov
Sergey Morozov

PLEASE NOTE
This publication cannot replace consultation with a trained legal professional. If you no longer wish to receive this newsletter, you can unsubscribe at any time by e-mail (please send an e-mail with the heading “Unsubscribe” to newsletter@bblaw.com) or any other declaration made to BEITEN BURKHARDT.

YOUR CONTACTS

MOSCOW
Turchaninov Per. 6/2 | 119034 Moscow
Falk Tischendorf
Tel.: +7 495 2329635 | Fax: +7 495 2329633
Falk.Tischendorf@bblaw.com

ST. PETERSBURG
Marata Str. 47-49 | Lit. A | Office 402 | 191002 St. Petersburg
Natalia Wilke
Tel.: +7 812 4496000 | Fax: +7 812 4496001
Natalia.Wilke@bblaw.com