

# Overview of court practice on independent guarantees: the legal position of the Russian Federation Supreme Court

June 2019

On 5 June 2019, the Presidium of the RF Supreme Court (the "**Supreme Court**") issued an overview of court practice on independent guarantees (the "**Overview**").

The Russian Federation Supreme Arbitrazh Court (the "**RF VAS**") had already issued a similar overview on bank guarantees prior to the Russian civil law reform of 2015, which had introduced the concept of independent guarantees.<sup>1</sup> However, this latest Overview is the first comprehensive summary of court practice on independent guarantees since the concept's introduction into Russian law.

We set out below the salient points of the Overview, as well as the business areas in which the relevant disputes arose.

Overview section	Salient points	Area of application
1	<p><b>When does the guarantee arise</b></p> <p>Unless the guarantee provides otherwise:</p> <ul style="list-style-type: none"><li>• a declaration of intent of the guarantor alone is sufficient; and</li><li>• the beneficiary is not required to send a written notice accepting the guarantee.</li></ul> <p>Therefore, unless the guarantee provides otherwise, it becomes effective immediately from the day the guarantor sends it to the beneficiary.</p>	<ul style="list-style-type: none"><li>• supply of goods;</li><li>• provision of services;</li><li>• construction contracts;</li><li>• budgetary lending;</li><li>• lending;</li><li>• state and municipal contracts;</li></ul>

<sup>1</sup> See RF SAC Presidium Information Letter No. 27 dated 15 January 1998 and RF VAS Plenum Resolution No. 14 dated 23 March 2012.

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		<ul style="list-style-type: none"> <li>• municipal solid waste management.</li> </ul>
2	<p><b>Criteria for identifying beneficiaries</b></p> <p>An independent guarantee will be considered issued even if the name of the beneficiary is not specified therein, <b>provided</b> there is no ambiguity in the beneficiary's identity (for example, if the guarantor sent the guarantee to a specific beneficiary which was disclosed by the principal during negotiations and there was no ambiguity as to the identity of the beneficiary).</p>	<ul style="list-style-type: none"> <li>• M&amp;A (in a voluntary / binding offer);</li> <li>• lending;</li> <li>• construction contracts.</li> </ul>
4	<p><b>Term for bringing a claim under a guarantee</b></p> <p>Unless the terms of the guarantee explicitly provide otherwise, a claim for payment under an independent guarantee is considered presented in time if, <i>inter alia</i>, it was delivered to a post office prior to the expiration of the guarantee, even though the guarantor actually received it after the expiration date.</p>	<ul style="list-style-type: none"> <li>• lending;</li> </ul>
6	<p><b>Guarantee surviving an amendment of the underlying obligation</b></p> <p>As a general rule, the scope of the guarantor's obligations remain unchanged when the terms of the underlying principal obligation are modified.</p> <p>Therefore, when a guarantee claim presented to the guarantor corresponds to the terms of the guarantee (e.g., the claim is made within the original liability cap), the guarantor cannot refuse to comply with its guarantee obligations even if the underlying principal obligation was modified after the issuance of the guarantee.</p>	<ul style="list-style-type: none"> <li>• supply of goods;</li> <li>• construction contracts.</li> </ul>
7, 8	<p><b>Beneficiary acting in bad faith</b></p> <p>The mere fact that the guarantee is invalid or void (e.g., lack of corporate authority as a result of a failure to procure an approval of the guarantee as a major transaction or an interested party transaction) will not, in and of itself, result in automatic termination of the guarantee.</p> <p>This is not the case, however, where a beneficiary knowingly acts in bad faith when procuring the guarantee (i.e., if the beneficiary was aware of a breach at the time the guarantee was issued). In such cases, the guarantor may submit a counterclaim to the beneficiary.</p> <p>Accordingly, violations committed when the guarantee was issued may be used as a counter-claim to the beneficiary's demand for payment under the guarantee, <b>provided</b> the beneficiary is a party to the guarantee and aware of those violations.</p>	<ul style="list-style-type: none"> <li>• lending;</li> <li>• construction contracts;</li> <li>• leasing.</li> </ul>

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11	<p><b>The concept of independence of the guarantee</b></p> <p>It is possible to deviate from the principle that the guarantee is independent, only if the beneficiary abuses its right to unconditionally receive payment.</p> <p>Abuse is manifest if the beneficiary clearly intends to enrich itself unjustly by demanding payment from the guarantor after having received due and punctual performance of the underlying obligation.</p>	
14	<p><b>Consequences of the guarantor's bankruptcy</b></p> <p>Bankruptcy of the guarantor while the guarantee is in effect:</p> <ul style="list-style-type: none"> <li>• is not, in and of itself,<sup>2</sup> a basis for terminating the obligations under the guarantee;</li> <li>• will naturally result in a decrease of the value of the guarantee (proportionately with the haircut for all unsecured creditors of the guarantor); and</li> <li>• may raise a question as to whether it is necessary to consider recalculating the previously agreed fee for issuing the guarantee.</li> </ul>	<ul style="list-style-type: none"> <li>• lending;</li> <li>• supply of goods;</li> <li>• sale-purchase;</li> <li>• state and municipal contracts;</li> <li>• agency contracts;</li> <li>• construction contracts.</li> </ul>
17	<p><b>The independent guarantee and the pretrial procedure</b></p> <p>The beneficiary's sending the guarantor a payment demand will be deemed a sufficient measure for resolving the dispute out of court.</p> <p>Therefore, it is not required for the beneficiary to send the guarantor a separate pre-trial claim before submitting the payment demand.</p>	

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<sup>2</sup> The validity of the guarantee and the possibility of challenging it will nevertheless be subject to general provisions of the bankruptcy laws.

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