

# Insight

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## Special Alert

### Clarifications of the Supreme Commercial Court on Suretyship Agreements

**On 12 July 2012 the Plenum of the Supreme Commercial Court of the Russian Federation adopted Resolution No. 42 "On Certain Matters of Resolving Disputes Related to Suretyship."**

The Resolution clarifies numerous issues related to securing obligations by the suretyship, including the following:

#### *Obligations that may be secured by the suretyship*

- The suretyship may secure, among other things, (i) non-monetary obligations (e.g., for the transfer of goods) because a creditor may have monetary claims to the debtor (damages, penalties, etc.); (ii) obligations arising from the deals made subject to conditions precedent or conditions subsequent; (iii) overdue obligations; and (iv) non-contractual obligations (e.g., compensation for harm).
- In the case of a dissolution of a secured agreement the suretyship will still secure obligations surviving or arising from the dissolution.
- A suretyship agreement may foresee that it secures claims arising in case of the invalidity of a secured agreement.

#### *Less rigid requirements to the description of secured obligations*

- If a suretyship agreement lacks some of the terms of a secured obligation (e.g., the amount of principal or interest, maturity), but the available description still allows the identification of the obligation that was/will be secured, or the suretyship agreement refers to the secured agreement, then it may not be found to be "unconcluded."
- If a suretyship agreement only indicates the principal amount and does not mention securing other obligations of the debtor (e.g., the interest), it means the secured claims are limited to the principal debt and the agreement may not be deemed "unconcluded" as a whole.



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### *Ability to provide for CPs*

- A suretyship agreement may be made subject to conditions precedent which precondition the agreement becoming effective (e.g., the creditor to take other security, the debtor or surety to change their shareholding structure or management bodies) or subject to conditions subsequent resulting in termination of suretyship (e.g., termination or invalidity of other security).

### *Additional obligations of a surety*

- A suretyship agreement securing a future obligation may foresee that the surety must perform certain obligations right after the suretyship agreement is concluded (i.e., before the secured obligation actually arises): e.g., maintain certain bank account balances and disclose data about certain facts to the creditor.

### *Impact of changes in secured obligations on the suretyship*

- If a secured obligation changes so that the principal or interest amount is increased without the consent of the surety, the suretyship will not terminate: in this case the surety will be liable to the creditor on the originally agreed terms of the secured obligation (the obligation is deemed unsecured by the suretyship in the changed part). Similarly, if the maturity of the secured obligation changes (via extension or reduction) without the surety's consent, the surety will be liable within the term of the suretyship based on the originally agreed terms of the secured obligation.
- A suretyship agreement may provide for an advance consent of the surety to be liable on the changed terms if the secured obligation changes, but the consent must be (i) explicit, and (ii) specify the limits of such acceptable changes (e.g., an amount or interest by which the principal or interest could be increased, a term for which the maturity date could be extended or reduced). If the suretyship agreement lacks such limits, the surety will be liable towards the creditor on the originally agreed terms.

### *Reorganization or liquidation of the debtor or surety*

- In the case of the debtor's reorganization, the rule for obtaining the surety's consent to be liable for a new debtor does not apply (as the debt passes over as a result of a universal legal succession).
- If the surety decides on its reorganization, this does not entitle the creditor to submit an early claim against the surety (because claims to the surety may be submitted only if the debtor does not perform/properly perform its obligations).
- If the creditor submits its claims to the surety before the debtor is liquidated, then the suretyship shall not be deemed terminated as a result of the termination of the secured obligation due to the debtor's liquidation.

### *Submitting claims to the surety*

- If the surety's liability is joint and several with that of the debtor then non-performance or improper performance of the secured obligation is a sufficient basis for a creditor to submit claims to the surety (the creditor is not required to prove that it made attempts to recover debt from the debtor).
- If the surety's liability is subsidiary (secondary) to that of the debtor, in order to submit claims to the surety the creditor should prove that the debtor refused to perform the secured obligation or has not responded within a reasonable time to the creditor's request for performance.
- A suretyship agreement may provide that a creditor is entitled to submit claims to the surety only after certain circumstances arise (e.g., if the debtor fails to timely perform a writ of execution for the recovery of debt by the creditor).
- The term of suretyship should not be considered as a "limitation period" and, therefore, the rules on limitation periods (i.e., including those on suspension of such terms in some cases) are not applicable to it.

### *Surety's objections (defenses) against the creditor's claims*

- Limitations may not be imposed on the surety's objections as to its relations with the creditor in a suretyship agreement.

### *Correlation of claims of the creditor and the surety who paid the debt*

- If the surety performs the secured obligation in part and the obligation is also secured by a pledge, the surety and the creditor become co-pledgeholders with equal rights for the satisfaction of their claims from the value of the pledged property; however, the surety is not allowed to exercise its rights in a way that may harm the creditor (e.g., impede enforcement of the pledge), whereas the creditor is allowed to exercise its rights as to the outstanding amount on a preferred basis as to the surety.
- The agreement between the creditor and the surety may provide that the pledge rights belonging to the creditor will not pass over to the surety upon payment of the debt.
- The agreement between the creditor and the surety may provide for the procedure and priority for the satisfaction of their claims against the debtor.

*Bankruptcy (insolvency) of the debtor or surety*

- If a supervision procedure is introduced with respect to the surety or the surety is found to be bankrupt, this may serve as a basis for the creditor to accelerate the loan (due to deterioration of security).
- The creditor is entitled to submit claims to the surety, including in the course of the bankruptcy process with respect to the surety, only if the secured obligation is breached by the debtor; in particular, if the debtor is found to be bankrupt (because when a company is found to be bankrupt its obligations are deemed to have matured).
- The creditor may initiate bankruptcy procedures both against the debtor and the surety; the creditor may submit its claims in the bankruptcy process of both the debtor and the surety.
- The creditor should submit its claims in the course of the bankruptcy process of the debtor before the register of creditors' claims is closed, otherwise its further claim to the surety may be denied (as the surety would not be able to obtain reimbursement from the debtor thereafter).
- A suretyship agreement may not be considered as a preferential transaction because it does not entail preferential satisfaction of claims of the debtor's creditor.

The Resolution also clarifies a number of issues related to suretyships granted by individuals; relations among the surety that paid the debt and the debtor; suretyship(s) granted by several persons; suretyship for bonds, as well as a number of procedural aspects of considering claims related to suretyships.

*The Resolution is mandatory for lower commercial courts when considering similar issues.*