



LT in focus

Changes to the RF Civil Code: means of securing the performance of obligations and the holding of a tender to conclude a contract

On 8 March 2015, the President of the Russian Federation signed Federal law No. 42-FZ “On amending the first part of the Civil Code of the Russian Federation” (hereinafter – “the Law”), which will come into effect on 1 June 2015 and introduces a number of significant changes to the Civil Code of the Russian Federation (hereinafter – “the RF Civil code”).

This article analyses the amendments concerning the means to secure the performance of obligations and the conclusion of a contract by tender.

Changes with regard to the means of securing performance of obligations

The new edition of the RF Civil Code expands the list of means of secure obligations performance. Firstly, an independent guarantee will replace the bank guarantee. Moreover, a security payment will be named in the RF Civil Code as a separate means to secure the performance of obligations.

Unlike the bank guarantee, an **independent guarantee** (Art. 368-379 the RF Civil Code) can be issued by any commercial organization. At the same time, the bank guarantee will stay in the RF Civil Code as a type of independent guarantee granted by banks and other credit institutions. The principle of independence of the guarantee has been enhanced: the amended version of the RF Civil Code stipulates that the guarantee depends neither on the secured obligation itself nor on any other obligations .

As a general rule, the independent guarantee is irrevocable and cannot be amended. Likewise, the rights under the guarantee cannot be transferred to a third party. These provisions are discretionary, and, provided that the relevant clauses are in place, the amount of the guarantee can be amended upon a certain term or event and the guarantee can be revoked or amended by the guarantor.

Some of the changes of the independent guarantee are designed to safeguard the rights of the guarantor and the principal. For example, if the beneficiary’s documents are false or their claims are unreasonable, they will be obliged to pay the damages this incurred to the guarantor or the principal. The agreement on the issue of the guarantee can stipulate otherwise. Moreover, the guarantor will be entitled to suspend the payment under the guarantee based on reasonable doubts regarding the authenticity of the submitted documents, the validity of the secured obligation or its non-performance.

Thus, the RF Civil Code provisions on the independent guarantee are generally in line with international trends in the regulation of this institute (cf. the Uniform Rules for Demand Guarantees, ICC publication 758) and aim to bring Russian legislation closer to international practice.

Art. 361–367 of the RF Civil Code on **surety** will also envisage a number of positions stated in the RF Supreme Arbitration Court Plenum Resolution No. 42 of 12 June 2012 “On several questions of dispute resolution related to surety”.

For example, the RF Civil Code will include provisions on the limitation of liability and recourse claims of co-guarantors, the right of the guarantor to abstain from performance if the creditor’s claims can be offset, etc. The surety shall also be considered valid after the liquidation of the debtor if the creditor filed the claims before the liquidation.

Another significant amendment concerns the introduction of the **security payment** in the RF Civil Code (Art. 381.1–381.2), which has been previously used as an unnamed means to secure obligations in lease, contracting and other relations (cf. Federal Arbitration Court of the Moscow District Resolution No. F05-7897/2014 of 31 July 2014 on case No. A40-120743/13-77-1051, Federal Arbitration Court of the West Siberian District Resolution of 8 May 2013 on case No. A45-23532/2012),



Under the new version of the RF Civil Code, a security payment is made by one party in favor of the other to secure a monetary obligation. It should be noted the security payment can secure a penalty or damages obligation, as well as future ones, which allows the use of the security payment in preliminary contracts.

The security payment is typically included in the performance of the secured obligation upon the occurrence of the circumstances agreed in the contract. Should such circumstances fail to arise or the secured obligation be terminated, the security payment shall be redeemed unless otherwise agreed between the parties.

We draw your attention to the fact that the provisions on the security payment apply when shares, bonds, other securities or fungible things (those that belong to a class) are used to secure obligations on their transfer. In our opinion, it remains unclear how this rule will correlate with the pledge in the purchase and sale agreement (p. 5, Art. 488 of the RF Civil Code) and how this encumbrance will be reflected in the shareholders' register.

New way to conclude contracts by tender

The Law stipulates the conditions of invalidating a tender. According to Art. 449 of the RF Civil Code, they are:

- Unreasonable dismissal from participation in a tender;
- Unreasonable refusal to accept the highest bid;
- Sale before the stated term.

This list of conditions is open: other material breaches (or those stipulated by the law) can cause the invalidation of a tender.

In addition, the contracts whose conclusion is allowed only at tender shall now be fulfilled personally. In other words, the winning bidder cannot assign the rights and obligations under such contracts to third parties (p. 7 Art. 448 of the RF Civil Code). It should also be noted that such contracts can be amended unless it affects the conditions that were material for the determination of the tender price.

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We hope that you will find the information in this issue both interesting and useful. Our specialists are available to answer any questions you may have with regard to the contents of this issue.

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