

TAKING SECURITY IN UZBEKISTAN

Uzbekistan is moving forward to improve its banking system and investment climate. One of the most effective ways to attract investors is to ensure the performance of the obligations and minimise the risk associated with the business activities. Unstable collateral and shortage of other means of securities may adversely affect the ability of lenders to raise additional funds.

Chapter 22 of the Civil Code of Uzbekistan indicates orthodox ways of securing the performance of obligations: a penalty, pledge, retention of the debtor's property, surety, guarantee, earnest money. In this overview, we will analyse each of these abovementioned securities in Uzbekistan.

Security for Performance of Obligations

The performance of obligations may be secured by several means, namely, by a penalty, pledge, retention of the debtor's property, surety, guarantee, earnest money, and other methods provided for by the law or agreement. Notably, the invalidity of an agreement on security does not entail the invalidity of the principal obligation. However, the invalidity of the principal obligation shall invalidate the securing obligation.

1. Penalty

A penalty is a monetary amount determined by the law or agreement that a debtor is obliged to pay to the creditor in case of non-performance or improper performance of an obligation. It can be in two forms: forfeiture or fine. Forfeiture is a penalty calculated in a fixed amount of money. Fine is a penalty calculated in percentage to unperformed part of the obligation per every day of delay. The amount of the penalty must be agreed in written form.

Also, the creditor has the right to demand payment of a penalty defined by the law regardless of whether or not the obligation to pay is provided by an agreement of the parties. The amount of the statutory penalty may be increased by the agreement between the parties unless it is prohibited by the law.

2. Pledge

The most common way to perform obligations is a pledge.

The pledge is the transfer by one person to another of property or the right to it against the security of an obligation. Pledge might be in the form of a pawn, mortgage, or a pledge of various rights.

A pawn is a pledge in which the pledged property is transferred from the pledger to the supervision of the pledgee and it is a pledge over movable property. A mortgage is a pledge over immovables. The subject of a pledge might be any property, including things and property rights except for things excluded from circulation or other claims in which assignment is prohibited by law. Property that is in common joint ownership can be pledged only with the written consent of all owners and the same procedure applies to the transferring joint-rights. The right of pledge arises from the moment the pledge agreement is concluded, or, if the agreement is subject to notarisation, from the moment of notarisation, and in the case of obligatory registration of the agreement - from the moment of its registration.

The pledge agreement must be made in writing and must contain certain information prescribed by law. A mortgage agreement, as well as an agreement on the pledge of movable property or rights to property as security for obligations under the agreement, must be notarised, with the exception of mortgage and pledge agreements when purchasing real estate and vehicles on the primary market.

3. Retention of the Debtor's Property

If the creditor holds the property that is subject to transfer to the debtor, in the event of the debtor's failure to perform the obligation to pay for this thing or reimburse, the creditor has the right to retain it until the corresponding obligation will be done.

Article 290 of the Uzbek Civil Code does not contain an exhaustive list of objects (things) for retention. At the same time, within the meaning of Article 290, there could be any object that has not been withdrawn from circulation. In other words, this may arise different questions such as whether the object of the right of retention can be both movable and immovable and whether it is permissible to retain these objects for unperformed obligations.

4. Surety

The surety is the guarantee of the debts of one party by another. Under a surety agreement, the person or organisation undertakes the performance of the debtor's obligations in whole or in part. A surety agreement might also be executed to secure an obligation that arises in the future. Likewise, other agreements the surety agreement must be concluded in writing. Otherwise, it entails the invalidity of the surety agreement.

The surety shall be obliged to the creditor in the same volume as the debtor, including the payment of the interest, the compensation of the court expenses, involved in the exaction of the debt and of the other losses, borne by the creditor, which have been caused by the debtor's non-performance or improper performance of the obligation. If the surety is borne by two or more persons, they will be jointly liable to the creditor.

5. Guarantee

According to Article 299 of the Uzbek Civil Code, the bank, other credit institution or insurance organisation (guarantor) give, at the request of another person (the principal), a written obligation to pay the principal's creditor (beneficiary), in accordance with the terms of the obligation given by the guarantor, a sum of money upon submission by the beneficiary of a written demand for its payment. In other words, the guarantee ensures the proper performance by the principal of his obligation to the beneficiary.

As a general rule, the principal pays remuneration to the guarantor for issuing a guarantee.

In order to receive money from the guarantor, the beneficiary must submit a claim for the payment of the sum of money in written form, with the documents, indicated in the guarantee, enclosed to it. The beneficiary shall also point out, either in the claim itself or in the enclosed documents, what are the principal's violation of the obligation, to secure which the guarantee was issued.

However, the guarantor may refuse the beneficiary on its demand if this demand or the documents attached to it do not comply with the terms of the guarantee or are presented to the guarantor at the end of the period specified in the guarantee. The guarantor must immediately notify the beneficiary of the refusal to satisfy his claim.

There are obligations of the guarantor to the beneficiary under the guarantee terminates:

1) payment to the beneficiary of the amount for which the guarantee was issued;

2) expiration of the term specified in the guarantee for which it was issued;

3) refusal of the beneficiary from his rights under the guarantee and its return to the guarantor;

4) refusal of the beneficiary from his right under the guarantee of a written application for the release of his obligations.

6. Earnest (advance) money

Earnest money is an amount of funds issued by one of the contracting parties to prove the conclusion of an agreement and to ensure its execution. The agreement on the earnest money regardless of the amount thereof must be made only in writing to resolve any disputes, and if possible - officially notarised.

If the party that has given the earnest money is responsible for the non-performance of the agreement, the money shall be left with the other party. If the responsibility for the non-performance of the agreement lies with the party, which has received the earnest money, it shall be obliged to pay to the other party the double amount of it. In addition, the party, responsible for the non-execution of the agreement, shall be obliged to recompense to the other party the losses, offsetting the amount of the earnest money, unless otherwise stipulated by the agreement.

All of the abovementioned securities have certain differences. However, all of them are used to secure the performance obligations. On one hand, they stimulate the debtors to perform the obligations. On the other hand, they are used as a security measure after the debtor has violated its obligations under the agreement. Therefore, securities are employed as *ex ante* and *ex post* measures to ensure the fulfillment of obligations.

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