Information for citation:
Syropyatova N. V. Obespechitel'naya funktsiya dogovora bankovskogo shcheta [The Security Function of a Bank Account Agreement]. *Vestnik Permskogo universiteta. Juridicheskie nauki* – Perm University Herald. Juridical Sciences. 2016. Issue 33. Pp. 319–328. (In Russ.). DOI: 10.17072/1995-4190-2016-33-319-328.

UDC 347.4
DOI: 10.17072/1995-4190-2016-33-319-328

THE SECURITY FUNCTION OF A BANK ACCOUNT AGREEMENT

N. V. Syropiatova

Perm State University
15, Bukireva st., Perm, 614990, Russia
ORCID: 0000-0002-5235-8931
ResearcherID: J-1611-2016
e-mail: syropiatova.psu@gmail.com

Introduction: *the article is devoted to the study of the security function of an interim bank account agreement. The author discusses some implementations of this function.* ***Purpose:*** *to form an idea of the bank account security function based on the analysis of scientific sources and regulations.* ***Methods:*** *the methodological framework of the research is based on a set of methods of scientific cognition, among which an important place is occupied by the functional method.* ***Results:*** *the author considers the concept of the security function of bank accounts, analyzes options for its implementation, reveals strengths and weaknesses of the legal regulation in this area.* ***Conclusions:*** *a bank account agreement has a security function. There are several options for its implementation. They include direct debit (charge-off without a client's order) and certain forms of non-cash payments made through bank accounts and possessing a security function. In addition, the Russian legislation has been supplemented with some types of bank accounts (escrow account agreement, escrow account) for which the security function is practically the main one.*

Keywords: security function of a contract; bank account agreement; security function of a bank account; types of bank accounts; securing performance of obligations; encouraging the debtor to the proper performance of obligations; guaranteeing the interests of the creditor; direct debiting of funds from bank accounts; escrow account agreement, escrow accounts

Information in Russian

ОБЕСПЕЧИТЕЛЬНАЯ ФУНКЦИЯ ДОГОВОРА БАНКОВСКОГО СЧЕТА

Статья подготовлена при финансовой поддержке РГНФ, грант № 16-03-00741 «Система правовых механизмов стимулирования должника к надлежащему исполнению обязательств и гарантирования интересов кредитора в российском гражданском праве»

Н. В. Сыропятова

Старший преподаватель кафедры предпринимательского
права, гражданского и арбитражного процесса
Пермский государственный национальный исследовательский университет
614990, Россия, г. Пермь, ул. Букирева, 15
ORCID: 0000-0002-5235-8931
ResearcherID: J-1611-2016
e-mail: syropiatova.psu@gmail.com

Введение: *статья посвящена исследованию обеспечительной функции договора банковского счета. Рассматриваются отдельные варианты реализации данной функции.* ***Цель:*** *на основе анализа научных источников, нормативных правовых актов*

сформировать представление об обеспечительной функции договора банковского счета. ***Методы:*** *совокупность методов научного познания, среди которых важное место занимает функциональный метод.* ***Результаты:*** *рассмотрено понятие обеспечительной функции договора банковского счета, проанализированы варианты ее реализации, отмечены достоинства и недостатки правового регулирования в данной сфере.* ***Выводы:*** *договор банковского счета обладает обеспечительной функцией. Возможны несколько вариантов ее реализации. Это и безакцептное списание (списание денежных средств, находящихся на счете, без распоряжения клиента), и использование отдельных форм безналичных расчетов, осуществляемых через банковские счета и обладающих обеспечительной функцией. Помимо этого, в российском законодательстве появились виды банковских счетов, для которых обеспечительная функция является практически основной (договор счета эскроу, залоговый счет).*

Ключевые слова: обеспечительная функция договора; договор банковского счета; обеспечительная функция договора банковского счета; виды банковских счетов; обеспечение исполнения обязательств; стимулирование должника к надлежащему исполнению обязательств; гарантирование интересов кредитора; безакцептное списание денежных средств с банковских счетов; договор счета эскроу; залоговые счета

Introduction

The vital issue of the civil agreement has not been thoroughly discussed in the legal studies. This matter has been generally narrowed to address the issue of the meaning of a contract. It is evident that the problem is of more complicated nature.

Any civil agreement has its own specific system of functions. The bank account agreement is not an exception, with its security function playing a special role among the others. The importance of this function has been constantly increasing. The dynamic development of socio-economic, legal relations, their complexity entails the emergence of new features (changing some previously available functions). Sometimes the functions appear and change faster than the changes in the structure that has this function. Changing functions gradually bring in the changes in the structure. A similar process occurs in the bank account agreement. Strengthening the role of the security function has resulted in modification in the bank account agreement, as well as development of new types of accounts.

The concept of the security function of the bank account agreement

There is no unified concept of a security function of the contract in the legal studies. A number of authors do not distinguish it as a separate function of a civil contract. Sometimes the security function is defined as a warranty. Thus, according to O. A. Krasavchikova, the warranty (security) function is that it is by signing an agreement itself the parties "lay" the interim incentives of mutual influence in its relations [7, p. 181].

E. V. Kolomensayadoes not specify a separate security function. In the framework of the protective function of the economic agreement, the author notes that at the moment of concluding the contract the parties may establish, in particular, the manner of enforcement of contractual obligations, determine the level of liability for the breach of an obligation and formulate, at their discretion, the condition of the contract about the maner of enforcement of the obligation. Thus, the parties stipulate in advance the ways of self-protection, given the ways established by the civil legislation, adapting them to their specific relationships and strengthening their purposeful action [6, p. 17].

It has been an increasingly common understanding among law scholars to consider the security function as an independent function of a civil contract. Moreover, in modern conditions its importance is constantly growing. However, the common notion of the "security function of agreement" has not been developed so far.

V. A. Bormotov considers the security function as a function of the method of enforcement of obligations [1, p. 95]. Analyzing the insurance contract, the author concludes that a security function of the insurance contract is the impact of the insurance obligation otherwise provided, the obligation as a way to enforce the obligations to be secured [2]. According to this view, the security function can be revealed through some ways of securing enforcement of obligations.

According to B. I. Salimzyanov, the security function is an essential feature of a contractual structure, which indicates the existence of a major security-organizational or a security-enforcement legal mechanism and acts as a concentrated expression of the target purpose of the relevant contractual design, as well as emphasizes its instrumental character. According to this perspective, the security function of a civil agreement should be divided into two types: a security-organizational and a security-enforcement ones. In the first case, the use of agreement construction is aimed at a legal formation of a particular, desired by the parties, structure of contractual relationships, while in the second case, such use is of a purely enforcement orientation nature of ensuring the proper enforcement of civil liabilities [8, p. 11].

From the above viewpoints, it follows that the security function is closely related to the methods of enforcement of obligations. In most cases, the legal mechanism with this function is the way of providing performance of liabilities. However, in modern conditions, it can be safe to note that there are some legal mechanisms that make the debtors properly perform their obligations and safeguard the interests of the creditor (in particular, guaranteeing the performance of obligations by the debtor), but not being not the methods of securing the fulfillment. All of these mechanisms have the security function.

A bank account agreement owns this function. Moreover, in the framework of such an agreement, there are a few legal mechanisms to implement it.

In this respect we conclude that the security function of the bank account agreement is the presence of legal mechanisms provided for in the clauses of this agreement, stimulating the debtor to proper execution of obligations and ensuring their real performance to the creditor.

Implementation of the security function of the Bank account agreement

According to Article 845 of the Civil Code of the Russian Federation[1] on the Bank account agreement the Bank undertakes to accept and enlist arriving on the account opened to the client (account holder), money funds, to carry out orders of the client about transfer and issue of the corresponding sums from the account and conduct other transactions on the account. The most common operations is transferring funds to the account and with drawing money from it. According to Article 854 of the Civil Code a withdrawal from the account should be performed by Bank on the orders of the client. Without the client's orders it can be ordered by a court decision and in the cases established by law or stipulated in the agreement between the Bank and the client.

It means the legislator considers the possibility of inclusion in the bank account agreement of the conditions providing execution of obligations by the owner of the bank account before their counterparties by no accept withdrawing from the account. In this case one can talk about a potentially incorporated security function in the Bank account agreement, which is implemented, in particular, by including the non acceptant conditions in the agreement, that are aimed at encouraging the debtor to proper execute the obligations and guaranteeing the creditor their real execution (providing execution of obligations).

The current definition of acceptance-free deduction of funds from Bank accounts is a challenge. There are different points of view, including the relationship between the concepts of "direct debit" and "indisputable write-off". It is quite often that they are identified and used as the synonyms. However, there are some differences between them. A literal interpretation of the term "direct debit" means that it is the debiting of funds from the account without acceptance, that is, without the consent of the owner. The term "indisputable write-off" can be considered as a withdrawal from the account in the absence of any dispute. However, the use of this term is rather conditional one because any write-down can be challenged in court.

The term "indisputable write-off" is most often used in public areas of the law where the possibility of such cancellation is provided for by law (for example, on the basis of acts of public authorities). Category "accept-free cancellation" is considered as the third party's requirement to the Bank for debiting funds from the client accounts. According to this view, direct accept-free is derived from the contractual relationship. Article 854 of the Civil Code states that withdrawal of monetary funds from the account can be performed without a client's order. In fact, this is the acceptance-free withdrawal.

[1] The Civil Code of the Russian Federation. Part Two: Feder. Law of the Russian Federation on January 26. 1996 № 14-FZ (ed. from 23.05.2016) // Coll. legislation Rus. Federation. 1996, number 5, st.410.

The former Guidelines on clearing settlements in the Russian Federation No. 2-P[1] Para. 8.2 provided that the calculations under the collection are carried out on the basis of payment claims, the payment of which may be made by order of the payer (with the acceptance) or without their order (without acceptance), and by collection orders that are paid for without the order of the payer (in an indisputable order). That is, the debiting without acceptance and in indisputable order was planned on the basis of various settlement documents. In the Regulation No. 2-P the term was used both as non-acceptance and indisputable write-off.

The Regulation of the Bank of Russia "On the rules of implementation of money transfer" No. 383-P[2], dated 19.06.2012 is significantly different in its structure from the previously existing Provision No. 2-P. The rules governing the calculation of payment requirements and collection orders have been changed as well. But the adoption of a new act has caused more issues.

The Regulation No. 383-P states that calculations by collection orders and payments in the form of remittances at the request of the payee (direct debit) are the forms of cashless payments, although Chapter 46 of the Civil Code of the Russian Federation considers these as the types of calculations under the collection.

According to clause 7.4 of the Regulation No. 383-P, the application of collection orders at calculations under the collection is performed if the beneficiary has the right to present the order to the payer's Bank account, under law or the contract between the payer and the payer's Bank.

This clause also stated that if the right of the beneficiary to present the order to the payer's Bank account is provided by law, the application of collection orders at calculations under the collection is performed when the payer and (or) the recipient of funds provides the Bank with the information about the payee who is entitled to present collection orders to the Bank account of the payer, the obligation of the payer and the underlying contract.

If the right of the beneficiary to present the order to the payer's Bank account is stipulated in the agreement between the payer and the payer's Bank, the use of collection orders at calculations under the collection is carried out when the payer provides the payer's Bank with the information about the recipient of the funds entitled to present collection orders to the Bank account of the payer, the obligation of the payer and the underlying agreement.

The payer's right to present collection orders to the Bank account can be confirmed by the recipient of funds through a submission of the corresponding documents to the payer's Bank. If the recipient is the payer's Bank, the condition of money withdrawal from the payer's Bank account can be provided by the Bank account agreement and (or) other agreement between the payer's Bank and the payer.

Chapter 9 of the Regulation No. 383-P is devoted to calculations in the form of remittances at the request of the payee (direct debit).In accordance with clause 9.2. of the Regulation No. 383-P the payment request is applied while performing cashless payments in the form of remittances at the request of the beneficiary, another order of the payee issued in accordance with paragraph 1.11 of the Regulation.

Clause 2.9.1 of the Regulation No. 383-P provides that the agreement between the payer's Bank and the payer and (or) in a separate message or a document, including statements of the acceptance in advance made by the payer electronically or on paper, can include this acceptance in advance, indicating the amount of acceptance or its determination procedure, the information about the recipient of funds entitled to present orders to the payer's Bank account, the obligation of the payer and the underlying agreement, including the cases envisaged by the federal law, with an indication of the ability (inability) of a partial execution of the order, as well as other information.Thus, the security function of the Bank account agreement can be implemented through the institution of acceptance-free write off.

From the above it follows that some forms of wire settlements themselves also have the security function. However, its implementation in most cases is only possible through the Bank account agreement. One of the forms of cashless payments with the security function is the letter of credit that the parties should apply to ensure

[1] Regulations on non-cash transactions in the Russian Federation: approved Bank of Russia on October 3. 2002 № 2-P; Registered Russian Ministry of Justice on December 23. 2002 № 4068 (repealed) // Bulletin of the Bank of Russia. 2002. number 74.

[2] On the rules of implementation of money transfer: approved Bank of Russia June 19, 2012 № 383-P (as amended on 11.06.2015.); Registered in the Russian Ministry of Justice on June 22, 2012 № 24667) // Bulletin of the Bank of Russia. 2012. number 34.

the performance of the obligations, and stimulate the debtor to proper execution of obligations to the creditor and guarantee their actual implementation. The presence of the security function in the letter of credit explains the popularity of this form of cashless payments in Russia and abroad [9, p.1].

The development and increasing complexity of civil legal relations and the current economic situation have necessitated the improvement of the civil legislation in part of ensuring fulfillment of obligations.

The methods to ensure the fulfillment of obligations in the Civil Code of the Russian Federation have not always met the needs of the dynamically developing civil turnover. In this context, there is a necessity to develop new legal mechanisms that would reliably and efficiently provide execution of obligations which stimulate the debtor to proper execution of obligations and guarantee the lender their real performance. Due to the fact, that today most calculations are carried out in cashless form using Bank accounts, improvement of legislation and development of legal mechanisms with the security function in the framework of the Bank account contract are relevant and valuable. The legislator has introduced the agreement of the escrow account into the civil law in response to the arising need for the emergence of new types of accounts, the main function of which is the security function.

The security function of the escrow account

On 1 July 2014 the agreement of escrow account was included in Chapter 45 of the Civil Code of the Russian Federation. In accordance with Article 860.7 of The Civil Code on the escrow account agreement the Bank (the escrow agent) opens a special escrow account for recording and blocking monetary funds received from the account holder (depositor) in order to their transfer to another person (beneficiary) in the event of the grounds stipulated in the agreement between the Bank, the depositor and the beneficiary.

The escrow account agreement was borrowed from the Anglo-Saxon system of law. In foreign countries this type of account is quite common and it has long been used in practice [10]. In Russia, the absence of escrow accounts was compensated by some similar, at first glance, legal structures, such as a letter of credit, execution of obligations in the notary's deposit, rental deposit boxes, etc. However, the escrow account agreement has some fundamental distinctions that effectively implement the security function.

Reforming the civil legislation, in general and the rules governing the Bank account agreement, in particular, is aimed at increasing the number of legal mechanisms in the banking sector, including the security function among the main ones. The emergence of legal regulation of the escrow account agreement in Russia is also due to this cause.

The beneficiary is guaranteed to receive cash upon the occurrence of certain grounds (for example, in the performance of its obligations under the primary obligation), and the depositor guarantees that the funds will be transferred to the counterparty (beneficiary) only if there are reasons stipulated in the contract. If the grounds do not occur (e.g., the beneficiary does not comply with the assigned responsibilities), the funds will remain with the depositor. That is, each of the parties to the principal obligation is guaranteed to receive what they expected at the conclusion of the contract.

As it follows from Article 860.7 of the Civil Code the agreement of the escrow account is between the Bank (the escrow agent), the depositor and the beneficiary. In a relationship there is the third entity (party) that is independent and which ensures the safety of the funds and their transfer to the counterparty only in the event stipulated by the contract bases.

The draft of federal law on introducing amendments to the Civil Code of the Russian Federation[1] (hereinafter – the Draft of the amendments to the Civil Code) involves, in addition to the rules governing the escrow account agreement, the rules on the escrow agreements. Moreover, the provisions on the agreement for the escrow account were intended to regulate relations arising from the escrow agreement (the escrow agreement), in which the escrow agent was the Bank. However, the escrow account agreement was included in the Civil Code, whereas the escrow agreements were not. This is not entirely logical. It is also worth noting that, for example, Article 860.8 of the Civil Code mentions the escrow agreements, which are not present in the Civil Code of the RF.

[1] On introducing amendments to the part of the first, second, third and fourth of the Civil Code and Certain Legislative Acts of the Russian Federation: Feder. project. Law № 47538-6 (adopted by the State Duma in the first reading the Decision of the State Duma of the Federal Assembly of the Russian Federation of April 27. 2012 № 314-6 GD "On the draft Federal Law № 47538-6« On introducing Amendments to the part of the first, second, third and fourth of the Civil Code and Certain Legislative Acts of the Russian Federation "// Coll. Rus. law. Federation. 2012. st.2314.

Due to the fact that the rules on the agreement for the escrow account appeared in the Civil Code of the RF before the escrow agreement in Russia the number of persons entitled to act as escrow agents considerably limited if compared with the world practice.

In foreign countries these may be not only banks but also other entities. According to the Draft amendments of the Civil Code notaries, professional participants of securities market, insurance organizations and other persons could also act as escrow agents.

Under the current wording of the Civil Code escrow agents are banks. Perhaps, it is justified at this stage. For Russia, the escrow account is a new concept, the legal status of the escrow agents are not enough regulated in this regard, problems may arise related to the activities of escrow agents, as well as their honesty and reliability.

The Draft amendments of the Civil Code of the RF did not provide clear requirements for the escrow agents, including the licensing, which exists in many foreign countries with the aim of ensuring the reliability and integrity of the activities of escrow agents. It is also worth noting that in Russia the object of the deposit can be only money resource while abroad the object are things (including cash, certificated securities and documents), wire money and non-documentary securities.

The Russian legislation provides a number of additional guarantees for persons entering into an agreement for the escrow account. For example, Article 12.1 of the Federal Law "On insurance of individuals' deposits in the banks of the Russian Federation"[1] provides the specifics of insurance of money deposited in the escrow account opened for the transaction of purchase and sale of real estate.

This article stipulates that compensation shall be paid in the amount of 100 percent of the amount available on the account at the time of occurrence of the insured event but not exceeding 10 million rubles. As the general rule states, the amount of compensation on deposits in a Bank is 1 400 000 rubles (Article 11 of the Federal Law "On insurance of individuals' deposits in the banks of the Russian Federation"). The increased amount of compensation is also aimed at the effective implementation of the security functions of the escrow account agreement.

The appearance of the escrow account agreement in the Russian law has significantly changed the ideas about the Bank account. This is due to the fact that the agreement restricts the right of the account holder to freely dispose of the funds to close the Bank account, at any time, and it provides the parties the possibility of their agreement to change the priority of debiting funds from the account (within the limits established by law).

In the legal literature there is an opinion that the escrow account is not a Bank account. It is explained that the legal purpose of any contract of the Bank account should be always the provided opportunity for the account holder to make settlement and cash operations. Such an opportunity for the client as the owner of the escrow account is not even assumed [5, p. 6].

Indeed, Article 860.8 of the Civil Code provides that, unless otherwise is provided by the agreement, neither the depositor nor the beneficiary is entitled to dispose of funds on the escrow account, except for the cases mentioned in this article. Also, it is noted that the rule of Article 858 of the Civil Code, that prohibits limitation of the client's rights to dispose of funds held on the account, does not apply to the escrow account agreement. The legislators consider the escrow account as a type of the Bank accounts. Chapter 54 "Bank account" of the Civil Code contains provisions governing the agreement of the escrow account.

Also, clause 4 of Article 860.7 of the Civil Code states that the relationship of the parties in connection with opening, maintaining and closing of the escrow account are governed by the general provisions on the bank account, unless otherwise provided in Article 860.7-860.10 of the Civil Code or if it does not follow from the nature of the relationship of the parties.

The Instruction of Bank of Russia of 30.05.2014 No. 153-I "On opening and closing of Bank accounts, accounts on deposits (deposits), deposit accounts"[2] also includes the escrow account into the banking accounts. According to clause 2.1. of the Instruction No. 153-I, banks can open the following types of accounts in the currency of the Russian Federation and foreign currencies: current accounts; operating accounts; budget accounts; correspondent accounts; correspondent subaccounts; trust management accounts; banking

[1] On insurance of individual deposits in banks of the Russian Federation: Feder. Law of the Russian Federation on December 23. 2003 № 177-FZ (ed. by 07.13.2015) // Coll. Rus. legislation Federation. 2003. Number 52. st.5029.

[2] On opening and closing of Bank accounts, accounts on deposits (deposits), deposit accounts: the instruction of the Bank of Russia on May 30, 2014 № 153-I: Registered Ministry of Justice of Russia June 19, 2014 № 32813 // Bulletin of the Bank of Russia. 2014. number 60.

accounts; deposit accounts of the courts, departments of bailiffs, enforcement agencies, notaries; accounts on deposits (deposits). In clause 2.8 of the Instruction it is stated that the escrow account belongs to the special Bank accounts. Indeed, the restriction of the account owner (the bailor) does not exclude the possibility to include the escrow account to the Bank accounts. This restriction is only aimed at implementing the security function that allows you to distinguish the escrow account among other Bank account agreements as a separate type of account.

To a greater extent, the rules governing the escrow account agreement are discretionary, which allows us to expand the scope of application of this type of account and use it to enforce various obligations, taking into account their peculiarities (specifics).The appearance of the escrow account in the civil law is timely for Russia. This account has the potential to become an effective legal mechanism to enforce commitments.

However, the inclusion of the escrow account agreement in the Civil Code of the RF has brought in a number of issues associated with its use.

For example, on 08.09.2014 the banks (members of the Association of Russian banks) submitted a letter to E.S. Nabiullina, the Chairman of the Central Bank of the Russian Federation, "On the procedure of accounting of operations on account of escrow"[1]. Among the issues mentioned in the letter, there were those associated with the accounting and the regime of the escrow account.

For example, there was a question about the banks' obligations to provide information on the escrow account to the tax authority in accordance with Article 86 of the Tax Code of the RF. The banks tried to clarify regarding whom (the depositor or the beneficiary) they have fulfil this obligation. The letter reflects only some of the questions. In practice, there are a lot more issues, which indicates the necessity of further improvement of legal regulation of the escrow account agreement. At that, we consider not only civil law, but also other areas of law.

In addition to the agreement of the escrow account, another kind of Bank account has appeared in the Civil Code of the RF, for which the security function is the main one. This is the pledge account that we are going to analyze further.

[1] On the procedure of accounting of operations on account of escrow: an ARB Chairman of the Central Bank of the Russian Federation № A-02 / 5-551 dated 08 September. 2014 URL: www.arb.ru (reference date: 04.20.2016).

The security function of the pledge account

The Federal law of 21 December 2013 № 367-FZ[2] introduced amendments to the first part of the Civil Code. In particular, the renewed paragraph 3 of Chapter 23 of Civil Code of the Russian Federation consists of two sub-paragraphs, one of which is dedicated to individual types of pledge. It provides the rules for (in addition to existing collateral types) the pledge of obligation rights and the pledge of rights under a Bank account agreement. Article 358.1 of the Civil Code provides that subject to the pledge can be the property rights (requirements) arising from the obligations of the mortgagor. The pledger of the right can be the person who is the creditor in the obligation, which follows a pledged right (the right of the holder). According to clause 1 of Article 358.9 of the Civil Code a pledge subject can be the right under the Bank account agreement provided that the Bank opens the pledge account to a Bank client. Thus, in the Russian civil law there is a number of new institutions, including the pledge account.

In foreign countries it is common practice to apply the pledge of rights under a Bank account agreement whereas in the Russian law it is a novelty. Its inclusion in the Civil Code involves changes in the current position that are set out, in particular, in the Information letter of the Presidium of the Russian Federation of 15.01.1998 № 26 "Review of practice of consideration of disputes connected with application the norms of the Civil Code of the Russian Federation about pledge by arbitration courts"[3]. According to clause 3 of the Information letter the pledge subject cannot be defined as "money resources in the Bank account". However, in practice the economic entities bypassed this ban, trying to use a similar legal structure to enforce obligations. This happened due to the fact that in some cases, a pledge of rights under Bank account agreement is an effective way of security. It ensures the preferential satisfaction of the claims of the pledge holder before other creditors at the expense of non-cash money on the pledge account. The issue of considering the pledge account as a separate kind of accounts is a debatable one. The solution of this problem is of both theoretical and practical importance.

[2] On introducing amendments to the Civil Code of the Russian Federation and the Annulment of Certain Legislative Acts (Provisions of Legislative Acts) of the Russian Federation: Feder. Law on Dec 21. 2013 № 367-FZ // Meeting of the legislation of Dews. Federation. 2013. number 51. st.6687.

[3] Review of practice of consideration of disputes connected with application the norms of the Civil Code of the Russian Federation about pledge by arbitration courts: Inf. letter Presidium of the RF from 15 yanv.1998, the number 26 // the Bulletin YOU the Russian Federation. 1998. number 3.

This question was actively discussed at the round table "Collateral account: a new Institute of the Russian security" on 19 November 2014, with the representatives of science, commercial banks and banking associations, Central Bank of the Russian Federation and the Ministry of Justice of the Russian Federation. The views of the participants differed, but, as a result of the discussions, it was concluded, based on the position of the Central Bank that the pledge account is a type of payment account. This account was originally supposed to open up as a collateral one and it can not become as such after opening an account by signing an additional agreement to the existing Bank account agreement[1]. This position causes some arguments.

In the course of the discussion, L. Kupriyanova (the representative of the company "Expobank") reported that from the Central Bank response to their request, it follows that since the escrow account is a separate Bank account opened for accounting of funds withthe rights pledged and it has its own particular regulation, then the opening should be performed on the basis of a separate agreement of the pledge Bank account[2].

In Chapter 45 of the Civil Code of the Russian Federation (Part 2) the pledge account is not titled as a separate Bank account and it does not have its legal definition. Nor it mentions the Bank pledge account agreement. In the Draft amendments of the Civil Code Chapter 45 consisted of two parts: the first was devoted to General provisions about the Bank account, the second one to individual types of Bank accounts. The escrow account was not distinguished as separate account. However, Article 860 of the Draft of the Civil Code entitled "Application of General provisions on the Bank account to certain Bank accounts", noted that for the agreement pledge account the General provisions on the Bank account are applied in the part that is not regulated by the rules on pledge of rights under a Bank account agreement. A literal interpretation of this article leads to that the Draft amendments of the Civil Code considered the pledge account as one of the types of Bank accounts and identified a separate agreement of the pledge account. However, it was proposed to implement its legal regulation via the rules contained only in Chapter 23 of Civil Code of the Russian Federation, which is dedicated to the enforcement of obligations, in particular, related to the pledge and also to the General provisions on the Bank account. The proposed Draft of the Civil Code revision has not been implemented, and at present in Chapter 45 of Civil Code of the Russian Federation there are no articles on the pledge accounts (the agreement of pledge account). It is only Chapter 23 of Civil Code of the Russian Federation, that mentions these accounts and which is devoted, in particular, to the legal regulation of pledge of rights under a Bank account agreement.

Article 848 of the Civil Code binds the scope of Bank account transactions with the account. The Civil Code names only some of them. The list of accounts is included in the instructions of the Bank of Russia of 30.05.2014 No. 153-I "On opening and closing of Bank accounts, accounts on deposits (deposits), deposit accounts". Clauses 2.1 and 2.8 of Chapter 2 note that one of the types of Bank accounts are special Bank accounts, which include the pledge account.

Thus, while based on the current applicable legal norms it is difficult to directly answer the question whether the escrow account is a separate Bank account or not. In the Civil Code there is no direct indication that the pledge account is a separate Bank account. The corresponding conclusion can be drawn only if we make comprehensive analysis of normative legal acts, including the Instruction of Bank of Russia of 30.05.2014 № 153 and theoretical positions. If we do not consider the pledge account as a separate account, the section 1 of Article 358.9 of the Civil Code, that links the possibility of a pledge of rights under a Bank account agreement to the Bank opening the pledge account for their client, will be almost meaningless. In this case the settlement (current) account can be used for pledge of rights under a Bank account agreement. It is not necessary to open a separate account.

The unresolved question about the possibility of assignment of the pledge account to individual accounts, the lack of detailed legal regulation as well practice of application of these accounts in the Russian Federation cause a number of issues, particularly related to the opening of these accounts, operations with them, etc.

As it has already been noted, section 1 of Article 358.9 of the Civil Code provides that the subject of the pledge may be the rights under a Bank account agreement provided that the Bank opens the pledge account for its client.

A literal interpretation of this article states that an independent account of pledge security should be opened for the pledge of the rights. In this regard, the question arises

[1] Round table on "Collateral account: the new Institute of the Russian security" // Lawyer Company: electron. Zh. URL: http: //e.lawyercom.ru (reference date 04/17/2015).
[2] Ibid.

on what basis the account is opened (whether the contract is a collateral account, which, incidentally, was mentioned in the article 860 of the Draft amendments of the Civil Code, but was not introduced to the Civil Code of the RF).The Civil Code does not provide for a relevant agreement, while pointing out the necessity of opening an account. In the Instructions of Bank of Russia of 30.05.2014 № 153-И, clause 4.14 notes that in order to open a special Bank account, a person should submit to the Bank the same documents as for opening a current account, correspondent account or an operating account, subject to the requirements of the legislation. This paragraph also implies that if in order to open the pledge account, the Bank must have information about the pledgee of a collateral account. These rules allow us to consider the escrow account as a separate Bank account.

Also, another question arises whether the estimated (current) or any other account is a secured one at the same time. A. Egorov points out that the subject of the pledge may be the rights under a Bank account agreement provided that the Bank opens an account as the collateral account. He believes that in the opinion of developers of the Civil Code, the account can be opened in the mode of the pledge account provided that it is obvious that it is also a special pledge account and such mode is specified in advance, and the funds in the account can be pledged as well [4, p. 16].

However, in this case it is necessary to distinguish the concept of " type of accounts" and the concept of "mode of accounts". There is an opinion, that the types of Bank accounts should only include those contained in Chapter 45 of the Civil Code, and the mode of accounts – those "having the pledge" or lack of it[1]. This position may lead to the subjects' opening of almost all current accounts with the mode of "having the pledge", because it does not oblige the customer to use the account as collateral, but, if necessary, to use it appropriately.

Another matter is the possibility to transfer an already opened current account in the pledge account. The Civil Code of the Russian Federation has not settled this question directly. The answer is complex. According to CBR, the current account should initially be opened as a pledge account. After opening an account this will be impossible to do. However, this position is not very convenient for practice of pledge of rights under a Bank account agreement. If the account can be opened in the mode of the pledge account, then why should it be necessary to limit the transfer of the existing accounts into the pledge accounts.

V. Vitryansky notes that the Civil Code of the Russian Federation does not contain a mandatory dependence of a current account as collateral one upon the actual deposit of the funds in this account [3, pp. 9-10]. Opening the pledge account for the client is possible regardless the concluding the agreement on pledge of rights under Bank account agreement at that time. Also, the Civil Code establishes the possibility to open a deposit both for all funds held on account and a certain amount of money. Accordingly, the pledgee can use the funds above this amount. That is, in fact, the escrow account will serve as the operating (current) account. It should be noted that the pledge account can be used not only for encumbrances of funds that are on it, but for the funds under the pledge agreements of other property.

The emergence of pledge accounts in Russia is due to the need to establish effective ways to ensure the fulfillment of obligations, which has recently been given much attention in the legal literature. Also, it meets the demands of practice. Thus, under the Russian law, there appeared a new institute of the pledge account, which is important to ensure the performance of obligations.

The norms that are currently contained in the Civil Code and devoted to this kind of account raise a number of questions. It is only possible to solve them by a more detailed regulation of the pledge account, including Chapter 45 of the Civil Code, as well as by accumulation of judicial practice.

Conclusions

It is quite often that the demands of civil turnover are ahead of the development of science and law. The scope of enforcement of obligations is no exception either. The list of methods enshrined in the Civil Code of the Russian Federation in modern conditions is not enough for the effective implementation of the security function.

In this regard, in the framework of the reform of the civil law, there is a number of tools with the security function. They stimulate the debtor to proper execution of obligations and guarantee the lender their real execution (providing execution of obligations). At present such mechanisms exist in the Bank account agreement too.

[1] Round table on "Collateral account: the new Institute of the Russian security".

This agreement is one of the most common and popular in practice. A large part of bank settlements is carried out in cashless form using bank accounts, as a rule. The security function is becoming of particular importance. This function is presented by the legal mechanisms provided by the rules on the agreement of Bank account, stimulating the debtor to proper execution of obligations and ensuring the lender their real performance. For this agreement the security function plays a particular important role.

There are several options for implementing the security function. They comprise direct debiting (debiting the funds in the account, without a client's order), and the use of certain forms of non-cash payments carried out through Bank accounts with the security function. In addition, the Russian legislation have involved the types of bank accounts for which the security function is almost the main one. Such accounts include escrow accounts and pledge accounts.

References

1. *Bormotov A. V. Strakhovanie otvetstvennosti po dogovoru kak sposob obespecheniya ispolneniya obyazatel'stv* [Liability Insurance of the Contract Breach as a Guarantee of Obligation to be Discharged]. *Vestnik Permskogo universiteta. Juridicheskie nauki* – Perm University Herald. Juridical Sciences. 2010. Issue 3(9). Pp. 95–102. (In Russ.).
2. *Bormotov A. V. Obespechitel'naya funkciya dogovora strakhovaniya v rossiyskom grazhdanskom prave*: *dis. ... kand. yurid. nauk* [Security Function of the Insurance Contract in Russian Civil Law: Synopsis of Cand. jurid. sci. diss.]. Tomsk, 2010. 216 p. (In Russ.).
3. *Vitryanskij V. V. Novoe v pravovom regulirovanii zaloga* [The New in Legal Regulation of Pledge]. *Khozyaystvo i pravo* – Business and Law. 2014. Issue 10. Pp. 3–19. (In Russ.).
4. *Egorov A. V. Zalogovye shcheta: aktual'nye zadachi po nastroyke pravovoy konstruktsii* [Security Accounts: Crucial Tasks for Adjusting the Legal Construction]. *Khozyaystvo i pravo* – Business and Law. 2015. № 3. Pp. 13–26. (In Russ.).
5. *Efimova L. G. Kontseptual'nye, teoreticheskie i tekhnicheskie nedostatki v proekte GK RF (glava 45 GK RF «Bankovskiy schet»)* [Conceptual, Theoretical and Technical Deficiencies in the Draft of the RF Civil Code (Chapter 45 of the RF Civil Code "Bank Account")]. *Khozyajstvo i pravo* – Business and Law. 2012. № 11(430). Pp. 3–7. (In Russ.).
6. *Kolomenskaya E. V. Funktsii dogovora v torgovom oborote: dis. ... kand. yurid. nauk* [Functions of Contract in the Trade Turnover: Synopsis of Cand. jurid. sci. diss.]. Moscow, 2006. 27 p. (In Russ.).
7. *Krasavchikov O. A. Grazhdansko-pravovoy dogovor: ponyatie, soderzhanie i funktsii* [Civil Contract: Concept, Content and Functions]. *Antologiya ural'skoy tsivilistiki. 1925–1989: sb. st.* [Anthology of the Ural Civil Law. 1925–1989. Digest of Articles]. Moscow, 2001. 431 p. (In Russ.).
8. *Salimzyanov B. I. Obespechitel'naya funktsiya predvaritel'nogo dogovora v sfere oborota nedvizhimosti: dis. ... kand. yurid. nauk* [The Security Function of the Preliminary Contract in the Real Estate Turnover: Synopsis of Cand. jurid. sci. diss.]. Kazan, 2013. 207 p. (In Russ.).
9. *King R.* Gutteridge and Megrah's Law of Bankers' Commercial Credit. London and New York. Europa Publications. Taylor & Francis e-Library, 2004. 429 p. (In Eng.).
10. *Stanley S.* Reyburn California Escrow Procedure: a Blueprint for the Nation. Prentice-Hall, 1980. 320 p. (In Eng.).

References in Russian

1. *Бормотов А. В.* Страхование ответственности по договору как способ обеспечения исполнения обязательств // Вестник Пермского университета. Юридические науки. 2010. Вып. 3(9). С. 95–102.
2. *Бормотов А. В.* Обеспечительная функция договора страхования в российском гражданском праве: дис. … канд. юрид. наук. Томск, 2010. 216 с.
3. *Витрянский В. В.* Новое в правовом регулировании залога // Хозяйство и право. 2014. № 10. С. 3–19.
4. *Егоров А. В.* Залоговые счета: актуальные задачи по настройке правовой конструкции // Хозяйство и право. 2015. № 3. С. 13–26.
5. *Ефимова Л. Г* Концептуальные, теоретические и технические недостатки в проекте ГК РФ (глава 45 ГК РФ «Банковский счет») // Хозяйство и право. 2012. № 11(430). С. 3–7.
6. *Коломенская Е. В.* Функции договора в торговом обороте: дис. … канд. юрид. наук. М., 2006. 27 с.
7. *Красавчиков О. А.* Гражданско-правовой договор: понятие, содержание и функции // Антология уральской цивилистики. 1925–1989: сб. ст. М.: Статут, 2001. 431 с.
8. *Салимзянов Б. И.* Обеспечительная функция предварительного договора в сфере оборота недвижимости: дис. … канд. юрид. наук. Казань, 2013. 207 с.
9. *King R.* Gutteridge and Megrah's Law of Bankers' Commercial Credit. L.; N. Y.: Europa Publications; Taylor & Francis e-Library, 2004. 429 p.
10. *Stanley S.* Reyburn California Escrow Procedure: a Blueprint for the Nation. Prentice-Hall, 1980. 320 p.