

Professional payment guarantee newly introduced in Luxembourg

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A new professional payment guarantee law has been introduced in Luxembourg to provide professionals with a tool that grants a wider scope for contractual freedom while protecting the parties from a re-qualification that may not be in line with their legitimate expectations and their commercial agreements.

The professional payment guarantee law (the **New Law**) came into force on 17 July 2020 and creates a new type of guarantee in the Luxembourg legal system.

The professional payment guarantee (**PPG**) seeks to alleviate shortcomings of existing personal security interests, such as the first demand guarantee (*garantie à première demande*) which may be subject to judicial re-qualification (so that this instrument leads to legal uncertainties) and the suretyship (*cautionnement*) which is often considered as being too debtor-friendly and inflexible.

This briefing describes key features of the PPG.

What is a PPG?

The PPG is an undertaking by which a person, the guarantor, undertakes towards a beneficiary to pay, at the request of the beneficiary or an agreed third party, a sum determined in accordance with the agreed terms, in relation to a claim or claims or the risks associated therewith.

Scope

Although designed to be used in a professional context, the New Law does not contain any specific restrictions. PPG can therefore be granted by private individual, any type of legal entities (including vehicles without legal personality, such as special limited partnership (SCSp) and common investment fund (FCP)) and institutions.

Key terms

Conditions for the application of the New Law

There exist only two conditions for the application of the New Law, on one hand the parties shall expressly elect to submit their guarantee to the New Law and on the other hand the parties shall certify their decision in writing (electronic or any other durable medium also applicable).

Flexibility and legal certainty

The object and terms of the PPG and in particular the terms of the guarantor's obligation to pay under the PPG can be freely determined by the parties, without the risk of re-characterisation by a judge since the New Law expressly excludes the provisions of articles 2011 seq. of the Luxembourg Civil Code relating to suretyship (cautionnement).

The parties may expressly refer to the claims or risks guaranteed for the determination of the amount, the terms and the duration of the PPG.

Beneficiaries

The New Law shows a wide range of application, as a PPG may be established in favour of a person acting on behalf of the PPG beneficiaries, such as security agent, a trustee or a fiduciary to secure the claims of third party beneficiaries, present or future, provided that such third party beneficiaries are determined or determinable.

Persons acting on behalf of beneficiaries of the PPG, or the trustee, have the same rights as the direct beneficiaries, without prejudice to their obligations vis-à-vis third parties beneficiaries.

Default provisions

Unless otherwise agreed:

(a) the guarantor may not raise any defences arising from the guaranteed claims or risks;

(b) after payment, the guarantor has a personal recourse against the principal (donneur d'ordre) and is subrogated in the rights of the beneficiary in respect of the relevant claims up to the amount of his payment; and

(c) the guarantor remains liable towards the beneficiary to the full extent under the PPG even if the debtor of the guaranteed claim(s) is the subject of a reorganisation measure, insolvency or any other domestic or foreign measure affecting the rights of creditors, including when the receivables concerned are or have been the subject of a rescheduling, reduction or conversion measure into capital or any other instrument, except in case of application of the regime for over-indebtedness of individuals.

Existing guarantees

Existing guarantee agreements can be converted into a PPG by inter alia inserting therein the reference to the New Law.

Conclusion

The introduction of the PPG by the Luxembourg legislator is a further demonstration of the Grand Duchy's entrepreneurial and far-sighted approach to the challenging financial climate.

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