

Luxembourg adopts law on professional payment guarantees: enhanced contractual freedom and certainty



The legal framework for accessory guarantees (*cautionnements*) and autonomous guarantees (*garanties autonomes*) was a source of legal uncertainty given that, based on how the guarantee was written, an accessory guarantee could be re-qualified as an autonomous guarantee and more frequently, an autonomous guarantee could be re-qualified as an accessory guarantee. On 1 July 2020, the Luxembourg legislator adopted a new law on professional payment guarantees (the “**Law**”) in order to provide the parties with greater contractual flexibility and solve re-qualification issues.

A brief overview on the new professional payment guarantee

The Law defines a professional payment guarantee as an undertaking by the guarantor (a legal entity), to pay the beneficiary, at the request of the beneficiary or of an agreed third party (i.e. a security agent, trustee or fiduciary agent), an amount determined in accordance with agreed terms in relation to one or more claims or associated risks.

Contractual freedom offered by the new instrument

The Law offers a wide range of freedom to the parties who will be able to combine the elements of the accessory guarantees (i.e. reference to the guaranteed obligation, stipulation that the guarantor's obligation may not exceed that of the debtor and enforceability of the exceptions that the debtor may raise against the creditor) with those of the autonomous guarantees (i.e. payment without default by the debtor and payment even if the debtor is in collective proceedings).

Key benefits of the new instrument

- **Legal certainty:** this new Luxembourg tool provides the parties with contractual flexibility to achieve the contemplated goal without incurring the risk of their instrument's requalification.
- **A promising tool for future (or existing) international and domestic transactions:** this new instrument seems to be very useful for upcoming cross-border financing and capital markets transactions as well as domestic transactions by completing existing security packages. However, the parties will only be able to benefit from this new instrument if, in the guarantee agreement, they expressly refer to the Law. In addition, existing guarantee instruments (accessory guarantees or autonomous guarantees) can be amended to benefit from the provisions of the Law.
- **The professional payment guarantee may be issued in favour of an intermediary:** the new guarantee may be granted in favour of a third party acting for certain beneficiaries (such as a security agent, trustee or fiduciary agent) similarly to financial collateral arrangements under the law of 5 August 2005, as amended.

- **Protection offered in the event of insolvency:** the professional guarantee will resist against insolvency proceedings opened in respect of the principal obligor.

In the context of the current COVID-19 health crisis, the parties to a security agreement (accessory guarantee or autonomous guarantee) may certainly benefit from the advantages offered by this new law.

For more information and to stay up to date on this topic, please feel free to reach out to the contacts listed on this article or your usual Luther S.A. contact.

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