

Luxembourg's Impending Professional Guarantee of Payment Regime, 2020

On 22 April 2020, a new bill was submitted to the Luxembourg Chamber of Deputies, initiating the legislative process for the introduction of a new creditor friendly and flexible form of surety, the professional guarantee of payment (*garantie professionnelle de paiement*) ("PGP").

This new form of surety will supplement the security interests *in rem* (*sûretés réelles*, such as the pledge or the transfer of title for security purposes) that benefit from the regime of the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended (the "Collateral Law").

While the financial collateral arrangements that fell within the scope of the Collateral Law contributed to the continued attractiveness of Luxembourg's financial centre, Luxembourg law sureties (*sûretés personnelles*) remain the poor relation of security packages structured through Luxembourg.

Luxembourg is a civil law jurisdiction where the Napoleonic (French) civil code originally constituted the framework of its contract law. According to traditional civil law principles, autonomous (first demand) guarantees and accessory sureties abide by essentially conflicting and rather entrenched regimes.

The alternative, between (i) a surety (the "*cautionnement*"), the accessory nature of which prevented the waiver of defences arising

out of the underlying obligations / arrangements and (ii) the court-made autonomous first demand guarantees where any reference to the underlying secured obligations or arrangements triggered a risk of requalification, could not satisfy market expectations. This is particularly relevant to cross-border transactions driven out of common law jurisdictions that typically resort to guarantees governed by foreign law (often corresponding to the law governing the underlying / secured arrangements).

Noteworthy Features of the PGP

Though the draft bill is still at an early stage of the legislative process, it is already possible to identify the main features of the proposed PGP regime.

PGP may be established under private seal and will not be subject to taxes or registration duties, mirroring the light formalism that characterises financial collateral arrangements. The only formal conditions are that the parties must expressly submit the surety to the PGP law to be adopted and that such arrangement should be documented in writing (including in electronic form).

The PGP regime will grant the utmost flexibility to the parties to contractually determine the terms of the payment obligations bearing on the guarantor. Unlike first demand / autonomous guarantees, the PGP may validly

and expressly refer to the provisions of the underlying obligations (which may be existing or future, to the extent identifiable), in particular the amount payable upon the PGP being called (which may therefore track the amounts outstanding under the secured obligations) or its duration (which may terminate upon discharge of the secured obligations) without any risk of being requalified. The draft bill expressly states that the provisions of the Civil Code governing accessory sureties (*cautionnements*) may not impair the enforcement of the parties' agreed upon terms under the PGP.

Reflecting one of the main innovations of the Collateral Law, the accessoriness of PGPs are alleviated in the meaning that the circumstances conditioning the realisation of the PGP may be freely determined by the parties and be triggered regardless of whether the underlying secured obligations have been accelerated following the occurrence of a default thereunder.

The powers of trustees or agents acting in the name of secured parties, in favour of which a PGP may be set up, are expressly recognised, nullifying the need for sophisticated legal devices aimed at addressing issues resulting from conflicts between common law mechanisms and civil law principles (such as the setting up of parallel debt).

According to the draft bill, the waiver of the guarantor's rights of subrogation and recourses may be validly granted in advance. The validity of such anticipative waiver was questionable both in light of civil law principles and as to the corporate interest of the

guarantor until expressly confirmed under the Collateral Law¹.

Last but not least, PGP will be fully immunised against any insolvency or pre-insolvency proceedings (whether initiated in Luxembourg or abroad) affecting the primary debtor under the secured obligations, mirroring the insolvency remoteness of the financial collateral arrangements.

Impact on Current and Future Financing Deals

Although the draft bill is in the early stage of the legislative process, leaving room for further improvement, the introduction of the PGP will certainly enhance the attractiveness of Luxembourg as a jurisdiction of choice to structure complex cross-border financing arrangements. Neighbouring jurisdictions have previously attempted to create a new form of surety that would combine advantageous features of traditional accessory and autonomous guarantees, however their success remains debatable. There is no doubt that the PGP, once enacted, will become a popular solution, as it will build on the well-established case law that previously confirmed the precedence of contractual freedom, the unassailability and the insolvency remoteness of the foregoing financial collateral arrangements.

Luxembourg law governed security packages set up to secure financing arrangements in the context of fund finance deals (whether bridge financing or NAV and hybrid facilities), structured finance and securitisation schemes and more generally any kind of transaction that may be secured by obligations to pay bearing

¹ Following express confirmation introduced by the law of 20 May 2011 that amended the Collateral Law.

on legal entities² could advantageously include PGP from now on. Existing guarantee agreements could also benefit from the new PGP regime by way of an amendment incorporating an express reference to the PGP law once PGPs have force of law.

The PGP is expected to be a particularly valuable option in cases where the guarantor is located in Luxembourg, alleviating any concern relating to adverse consequences of conflict of laws rules, risks of requalification, recognition of foreign judgments and / or subsequent recovery proceedings in the guarantor's jurisdiction.

For further information or advice as to how this development may be beneficial to current financing transactions, please contact Arnaud Arrecgros or your usual Maples Group contact.

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² Natural persons may not grant PGP, but PGP may be granted to secure obligations bearing on natural persons