CLIFFORD CHANCE

NEW BILL INTRODUCING A PROFESSIONAL PAYMENT GUARANTEE UNDER LUXEMBOURG LAW

Bill 7567 on professional payment guarantees has been submitted to Parliament. The bill aims to create a new type of guarantee under Luxembourg law, in addition to existing instruments, such as accessory guarantees (*cautionnements*) and autonomous guarantees (*garanties autonomes*). The new framework is intended to provide the parties with greater contractual freedom, while preserving legal certainty and protecting against re-characterisation. Parties need to expressly submit their instruments to the new law. The law cannot apply to guarantors which are natural persons. Although the new bill is not directly related to COVID-19, the Luxembourg Finance Minister has stated that this regime introduces a new tool which can be used to implement certain anti-crisis measures in the context of the fight against the pandemic. This briefing describes key features of the new instrument.

Key aspects:

- New type of guarantee under Luxembourg law in addition to existing instruments.
- Law will apply upon express election of the parties (except for guarantors which are natural person)
- Provides contractual flexibility to professionals without the risk of re-characterisation into an accessory guarantee.
- Protection in case the principal obligation is affected by insolvency or other measures affecting creditors' rights.

This briefing speaks as of 23 April 2020

WHAT IS THE PROFESSIONAL PAYMENT GUARANTEE?

A professional guarantee consists in an undertaking by which the guarantor undertakes towards a beneficiary to pay, at the request of the beneficiary or of an agreed third party, a sum determined according to the agreed terms, in relation to one or more claims or the risks related to them. In order to benefit from this law, the guarantee will need to contain an express reference to the law on professional payment guarantees and be evidenced in writing (which can be in electronic form or any other durable medium).

The law will not apply when the guarantor is a natural person.

The guarantee can be issued at the request of a third party or the beneficiary.

FEATURES OF THE NEW INSTRUMENT

The bill outlines certain specific areas where the parties can freely agree the terms of the guarantee and contains certain default provisions applicable unless otherwise agreed by the parties.

Legal certainty for contractual terms

The Bill seeks to create legal certainty for the contractual terms agreed by the parties, in particular in relation to the modulation of the accessory nature of their guarantee, without risk of re-characterisation into an accessory guarantee (*cautionnement*).

As a result, parties can:

- contractually determine the object and terms of the guarantee, including conditions of the guarantor's payment obligation; and
- expressly refer to the claims or risks guaranteed for the determination of the amount, terms and duration of the guarantee; and contractually determine the call events, including in absence of defaults in the execution of claims or realisation of risks.

The guarantee can be granted in favour of (i) a person acting on behalf of the beneficiary/ies, (ii) a fiduciary or (iii) a trustee, to guarantee claims of an existing or future third-party beneficiary, provided that the latter is determined or determinable. Such persons will enjoy the same rights as those belonging to a direct beneficiary, without prejudice to their obligations towards the third-party beneficiary.

Features by default

The bill further provides that the following characteristics will apply, unless stated otherwise in the guarantee instrument:

- the guarantor cannot raise any defences arising from the concerned claims or risks;
- after the payment, the guarantor has a personal recourse against the debtor and is subrogated in the rights of the beneficiary in respect of the concerned claims and up to the paid amount; and
- the guarantor remains liable to the beneficiary for all its obligations under the guarantee, even where the debtor of the claims is subject to a reorganisation measure, insolvency or any other measures affecting the rights of creditors (e.g. rescheduling, reduction or conversion).

KEY BENEFITS OF THE NEW REGIME

The main benefits of the new regime are the following:

- **Flexibility without the risk of re-qualification**. Traditional personal guarantees did not always align with the needs of professional operators. This instrument provides parties with flexibility to achieve the intended objective, without the risk of re-characterisation by the judge into a fully accessory instrument (*cautionnement*), thereby allowing parties to create modulate the accessory features of their guarantee.
- **Guarantee can be granted in favour of an intermediary acting for the beneficiaries**. Similarly to financial collateral arrangements under the 2005 Financial Collateral Law, the guarantee can be granted to a third-party acting on behalf of the beneficiaries, such as security agent, trustee or fiduciary agent.
- **Protection in the event of insolvency or any other measures affecting creditors' rights**. The Bill confirms that the guarantor's obligation will not be impacted where the principal obligation is affected by insolvency or other measures affecting the rights of creditors, such as mandatory reduction/conversion of debt.

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