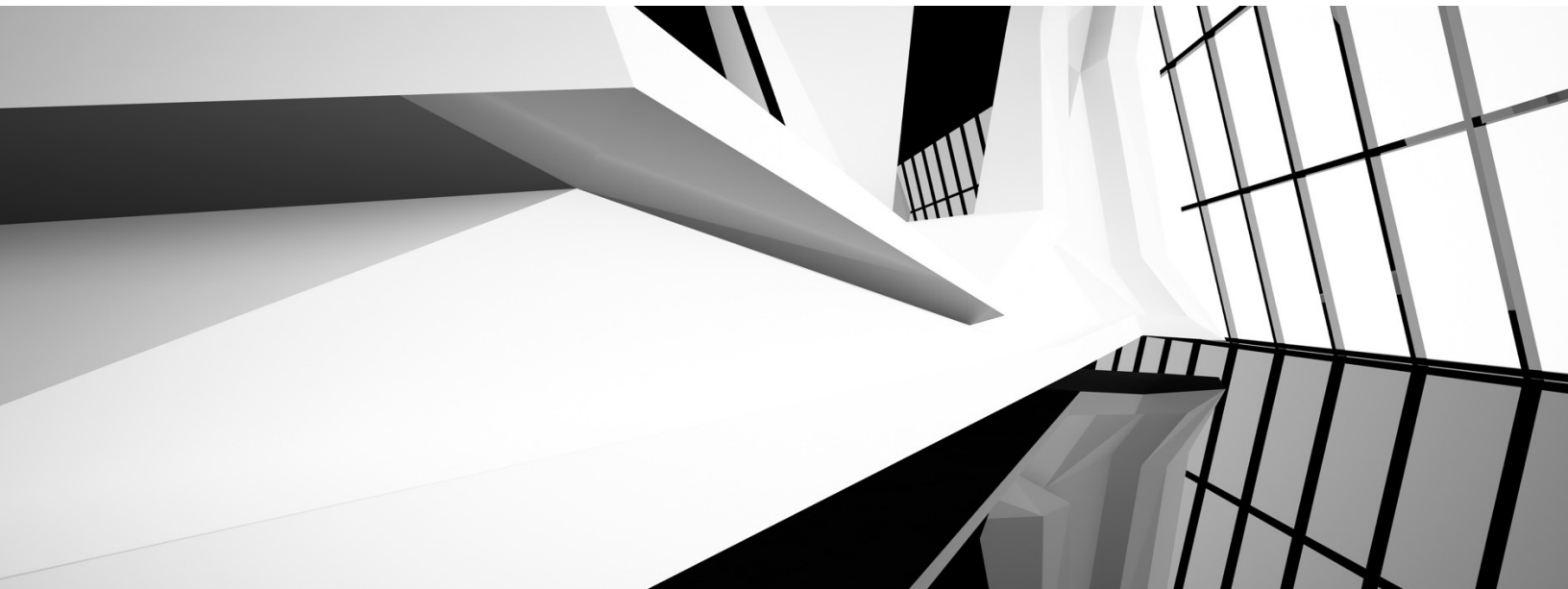


Praxio Legal Alert

May 2020

Luxembourg introduce a New Regime on Professional Payment Guarantee



Creativity

Efficiency

Sophistication

Knowledge

Summary

On 22 April 2020, the Luxembourg government submitted a new bill N°7567 to the Parliament aiming at introducing a new regime with respect to the granting of personal guarantees in a professional context (the “**Bill**”). The Bill is being expedited through the fast-track parliamentary procedure in the framework of the Covid-19 pandemic.

Overview

The Bill aims at introducing a special regime for personal guarantees (*sûretés personnelles*) granted for professional purpose. The main objective is to give a broader role to contractual freedom in the field of personal guarantees while preserving legal certainty as the law of 5 August 2005 (as amended) on financial collateral arrangements (the “**Financial Collateral Law**”) did in the field of the security interests used in financial transactions.

In Luxembourg law, the traditional alternative between a suretyship (*cautionnement*), governed by Articles 2011 ff. of the Civil Code, and an autonomous guarantee (*garantie autonome*), recognized by the practice, suffers from inherent limits in terms of structuring possibilities.

The independent guarantee and suretyship are not able to meet all the needs of the practice, especially in the context of sophisticated financial transactions where the re-characterisation of the instrument used is often a question. The Bill shall therefore be welcomed by the Luxembourg practitioners.

Conditions of the guarantee

Pursuant to the Bill, in order to benefit from the new type of guarantee, the following cumulative conditions should be met:

- An express reference must be made to the upcoming law;
- The guarantee shall be evidenced in writing either in electronic form or under any other durable form; and
- The guarantor must be a legal person.

Contractual freedom and legal certainty

- The terms and conditions of the guarantee, in particular the modalities of the payment obligation of the guarantor can be freely determined by the parties including the accessory nature of the guarantee without the traditional risk of re-characterisation of the guarantee as a suretyship (*cautionnement*);
- The parties can expressly refer to the claims or risks guaranteed for the determination of the amount, of the terms and the duration of the guarantee;
- The parties can freely determine the events giving right to the call of the guarantee, meaning that the guarantee can be called/enforced even in the absence of defaults in the performance of the guaranteed claims or occurrence of the guaranteed risks;
- The guarantee can cover present, future or even contingent claims and the risks associated with them, whether determinable or not; and

- Similarly to collaterals covered by the Financial Collateral Law, the guarantee may be provided in favour of (i) a person acting for the account of the beneficiaries of the guarantee, (ii) a fiduciary or (iii) a trustee, to secure the claims of third-party beneficiaries, present or future, provided that such third-party beneficiaries are determined or determinable. Without prejudice to their duties towards the third-party beneficiaries of the financial collateral arrangements, said persons enjoy the same rights as those granted to direct beneficiaries of the guarantee.
- The Bill also confirms, in line with the Financial Collateral Law, the immune nature of the guarantee in case the principal obligation is affected by insolvency measures or other measure that would be affecting creditors rights generally.

The additional legal certainty avoiding the risk of qualification of the personal guarantee as a suretyship, combined with contract freedom will make this new Luxembourg tool very useful in cross-border financing and capital market transactions.

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