Luxembourg: Law of 10 July 2019 on professional payment guarantees

Last summer, Luxembourg saw the enactment of the law of 10 July 2019 on professional payment guarantees (the "PPG Law"), introducing the professional payment guarantee ("PPG"), a completely new type of personal guarantee, whose efficacy and flexibility are by no means insignificant for lenders wishing to sail safe in somewhat troubled waters.

Although the Luxembourg banking industry had already expressed the wish to have a legal tool in Luxembourg akin to the PPG a while before the outbreak of the COVID-19 pandemic, the current worldwide crisis has certainly contributed to expediting the passing and enactment of the PPG Law.

Behind the PPG Law lies the desire to create a type of personal guarantee previously unknown to Luxembourg law, whose features and functioning are left almost entirely to be fully shaped by the parties. Accordingly, it is possible for a PPG to adopt traits in common with the two traditional types of personal guarantees in Luxembourg (i.e. the ancillary guarantees (*cautionnements*) and first-demand guarantees (*guaranties à première demande*)). In such a case, the PPG does not run the risk of being re-characterised as an ancillary guarantee, which is the default type of personal guarantee under Luxembourg law. The absence of such a consequence is even expressly confirmed in the PPG Law itself, which specifies that unless otherwise agreed in the PPG, the fallback rules of the Luxembourg Civil Code on ancillary guarantees (which are generally rather more favourable to guarantors) will not prevent the enforcement of the PPG according to the terms agreed therein.

The PPG Law also allows the parties to expressly give up any personal or subrogatory right of recourse that the guarantor would otherwise have against the guaranteed debtor following the enforcement of the PPG.

A noteworthy topic covered by the PPG law, which will certainly pique the interest of insolvency practitioners, is the fate of the PGG when the debtor under the guaranteed obligations is subject to domestic or foreign "reorganisation measures", "winding-up proceedings" or similar proceedings. According to Article 4(6) of the PPG Law, the occurrence of such measures or proceedings has no disruptive effect on the obligations of the guarantor vis-à-vis the beneficiary under the PPG, who remains bound by his payment obligation thereunder.

Whilst the legal definitions of "*reorganisation measures*" and "*winding-up proceedings*" necessarily require the involvement of administrative or judicial authorities, the PPG Law also encompasses more generally all national or foreign measures affecting the rights of the creditors of the guaranteed debtor, as well as situations where the debts of the guaranteed debtors are rescheduled, reduced or converted into equity or similar instruments. The only exception provided by the PPG Law relates to the Luxembourg Law of 8 January 2013 concerning over-indebtedness, which applies to non-professional debts of private individuals.

This innovative rule can be likened to the level of protection afforded to the beneficiaries of financial collateral arrangements ("**FCAs**") under the law of 5 August 2005 on financial collateral arrangements, as amended (the "**2005 Law**"). In particular, enforcement events and netting agreements falling within the scope of the 2005 Law and the valuation and enforcement measures agreed between the parties are binding on third parties, including trustees-in-bankruptcy and other types of insolvency receivers. Moreover, domestic or foreign insolvency proceedings (except for the Luxembourg proceedings for over-indebtedness) have no bearing on the validity of Luxembourg FCAs or netting agreements, or their enforcement, such a rule being extended to similar foreign FCAs and foreign netting agreements.

Since the sole requirement imposed by the PPG Law to benefit from its provisions is to expressly elect for its application in the PPG itself, it is expected that the use of this new type of guarantee will blossom in the coming years, and to the delight or dismay of insolvency practitioners, may even supplant other types of domestic and foreign personal guarantee. ■

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