# Restructuring & Insolvency

In 46 jurisdictions worldwide

*Contributing editor*
**Bruce Leonard**

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GETTING THE DEAL THROUGH

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# Luxembourg

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## Legislation

**1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?**

The following types of procedure are provided for under Luxembourg law: bankruptcy (under articles 437 ff of the Luxembourg Commercial Code (Commercial Code)), controlled management, reprieve for payments and composition with creditors to avoid bankruptcy.

To determine if a debtor is bankrupt, two criteria are to be met cumulatively: the inability to pay due debts and to raise credit.

## Courts

**2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?**

The insolvency process is dealt with by the commercial courts and by the commercial chamber of the Court of Appeal. There are restrictions on the matters that the court may deal with in case of dispute of a creditor's claim. If the insolvency administrator disputes the claim of a creditor, it may happen that the debate on such dispute is not a commercial matter (if the creditor is an employee for example). In such a case, the dispute will be dealt with by the court having jurisdiction (Civil Court or Labour Court for example).

## Excluded entities and excluded assets

**3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?**

Individuals and corporate entities exercising civil activities are excluded from bankruptcy procedure. Apart from the two cumulative conditions (inability to pay due debts and inability to raise credit), a third condition to apply for bankruptcy is required: being a commercial entity or an individual exercising commercial activities.

Moreover, the financial sector deals with its own regulations (Law of 5 April 1993 on the financial sector, Law of 30 March 1988 on undertaking for collective investment and Law of 6 December 1991 on the insurance and reinsurance sector).

A certain number of assets are protected from insolvency proceedings involving a physical person (clothes, personal goods, some furniture).

## Protection for large financial institutions

**4 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?**

On 12 December 2012, the CSSF (Luxembourg financial regulator) published Circular 12/552 on central administration, internal governance and risk management, which was a first step towards transparency and more control by the CSSF according to EBA recommendations.

Moreover, in 2014, two new bills of law aim at establishing a systemic risk committee and implementing Directive 2013/36/EU. They could be considered as proactive measures to prevent systemic risks.

## Secured lending and credit (immoveables)

**5 What principal types of security are taken on immoveable (real) property?**

Three types of security could be used for immoveable property:

- mortgage, which allows the mortgagee to sell the property upon default of the debtor through a public auction and to use the proceeds of the sale to be reimbursed as a priority;
- mortgage's mandate, which allows creditors to register the mortgage at a later stage but without guarantees on its rank as mortgagee; and
- vendor's privilege, which is automatically registered by the Mortgage Registration Office in case the property's price of sale is not entirely paid by the purchaser. It is equivalent to a mortgage.

## Secured lending and credit (moveables)

**6 What principal types of security are taken on moveable (personal) property?**

The most common security in Luxembourg for moveable properties is the pledge submitted to Financial Collateral Law (law dated 5 August 2005 as amended) provisions. This law allows the granting of a security arrangement until the last hour of opening a bankruptcy proceeding without any claw-back risk (suspect period); thereafter the appropriation of assets or their sale by pledgee is allowed without any court authorisation and is a fairly quick procedure.

For tradesmen, the use of retention of title is also very common. The property of the asset is kept with the seller until full payment and it is opposable to the insolvency administrator.

## Unsecured credit

**7 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?**

Unsecured creditors may start legal proceedings in order to obtain a judgment (or seizures or attachments) before bankruptcy or controlled management starts. Depending on the type of proceedings (judgment or attachment/seizures), these processes can be time-consuming.

There is no special procedure applying to foreign creditors. Once bankruptcy proceedings are opened, unsecured creditors are prevented from starting legal proceedings and shall lodge their claim with the insolvency administrator. The pending seizure or attachment proceedings are stopped. Once controlled management proceedings and reprieve from payment proceedings are opened, it is still possible to start legal proceedings but all enforcement proceedings are stopped.

## Voluntary liquidations

**8 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?**

The debtor shall provide a statement to the court enumerating and evaluating all assets and liabilities. Then, the bankruptcy judgment is issued by the court if the two cumulative conditions are met.

## Involuntary liquidations

**9 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?**

Bankruptcy can be declared by the Commercial Court at the request of any creditor. The creditor must summon the debtor before the court to request its bankruptcy and must provide the proof that the two cumulative conditions of bankruptcy are fulfilled. The bankruptcy entails the deprivation by the debtor of the administration of its own assets and leads the court to appoint an insolvency administrator. The assets of the debtor shall be managed by the insolvency administrator and divided between the creditors, taking into consideration their respective privileges and rank.

## Voluntary reorganisations

**10 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?**

Controlled management may be opened when a company has lost its creditworthiness or has difficulties in meeting all commitments, and should help the debtor to reorganise its business. Only the debtor may file a petition with the Commercial Court, which will either reject or validate the procedure. Commissioners, appointed by the court, will control the management of the company and prepare a reorganisation plan. This plan must be approved by the creditors and the court to become compulsory.

## Involuntary reorganisations

**11 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?**

In Luxembourg, the sole initiator of a reorganisation procedure is the entrepreneur, the company itself. It means a creditor is not allowed to request the court to place the debtor in an involuntary reorganisation.

## Mandatory commencement of insolvency proceedings

**12 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?**

The board of directors of a Luxembourg company is under a legal obligation to file for bankruptcy within one month as from the moment the two cumulative conditions are met. If the board of directors fails to file for insolvency within the requested time limit, they could be subject to both criminal and civil liabilities if the court estimates that in not complying with their obligation they have contributed to the bankruptcy.

## Doing business in reorganisations

**13 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?**

In controlled management proceedings, the court's decision to delegate a judge to assess the situation of the debtor until a final decision on the motion has been taken suspends subsequent implementing acts. Moreover, from the date of the decision, the representative body of the debtor cannot, under penalty of nullity, alienate, pledge or mortgage, commit or receive a movable asset without the written permission of the delegated judge. In practice, the directors assume the daily management but for any exceptional transaction they must request the approval of the judge delegated.

Unfortunately, there is no specific provision for suppliers providing goods or services after the first judgment. Nevertheless they are creditors of the 'mass', superseding the previous creditors. Creditors have no right of supervision and cannot interfere in the affairs of the company. Directors and officers are no longer free to manage the business as they deem fit, they are subject to the control or the authorisation firstly of the delegated judge and secondly to the commissioners.

## Stays of proceedings and moratoria

**14 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?**

For controlled management proceedings, the court's decision to delegate a judge ipso jure in favour of the applicant and until a final decision on the motion has been taken suspends subsequent implementing acts (the enforceability of judgments is no longer possible). This also applies to secured creditors, with the exception of holder security benefiting from Financial Collateral Law provisions. The same applies to reprieve of payment as soon as it is pronounced.

With regards to bankruptcy proceedings, the bankruptcy judgment stops the exercise of civil proceedings against the person of the debtor, as well as any seizure at the request of the unsecured and non-privileged creditors, on the moveable and immoveable assets. Again the creditors with security created under Financial Collateral Law are not concerned by this freeze of enforceability.

## Post-filing credit

**15 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?**

There is no provision in the Commercial Code (bankruptcy) or in the law (controlled management).

Nevertheless, in case of controlled management during the first period (judge appointed to assess the position of the company), the debtor who needs financing could find an agreement and have it approved by the delegated judge. In such a case the creditor will be a creditor of the so-called mass debt born after the first judgment and will rank before unsecured creditor who had their claim existing beforehand. The claim ranks pari passu with the other debts of the mass.

Luxembourg Collateral Law (5 August 2005 as amended) does not allow to take security after the beginning of the procedure (bankruptcy judgment or, in controlled management, the first judgment appointing a delegated judge).

## Set-off and netting

**16 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?**

According to the Financial Collateral Law, close-out netting provisions are valid and enforceable against third parties and liquidators and are effective notwithstanding the commencement or continuation of reorganisation measures or liquidation proceedings, without regard for the moment when these provisions, including those providing for netting, were agreed upon or enforced (nevertheless only if created before the opening of any reorganisations or insolvency measures).

Without any contractual provisions, the legal set-offs foreseen by article 1289 ff of the Civil Code are possible and according to case law both in the case of controlled management and bankruptcy (set-off takes place only between two debts which have likewise as their object a sum of money or a certain quantity of fungibles of the same kind and which are likewise liquid and due).

## Sale of assets

**17 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?**

Luxembourg laws are quite basic. Nevertheless, the practice has shown that the administrators and the courts are able to find pragmatic solutions.

The bankruptcy provisions are laconic: 'the insolvency administrator will organise the sale of real estate property, goods and moveable properties'. Therefore the insolvency administrator will either sell properties via an auction process or a free-handed sale. Luxembourg does not recognise

pre-packaged sales, therefore the freehand sale or the auction are proposed by the insolvency administrator and approved by the judge commissioner; the administrator could sell asset by asset or an entire portfolio. The assets are usually acquired 'free and clear' apart from normal claim, eg, a tenant against his bankrupt landlord.

The administrator could engage his own liability in the process of sale and directors are no longer in charge. Therefore 'stalking horse' bids would not be possible. Credit biddings in sales are not foreseen as such but through legal compensation and could happen if the offer is the fairest at market conditions.

## Intellectual property assets in insolvencies

**18 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?**

In Luxembourg, there is not text governing the fate reserved to IP assets in insolvencies and, in consequence, general contract law must apply. An IP licensor or owner cannot terminate the agreement concluded with the bankrupt company just because an insolvency proceeding is opened except if the agreement contains a specific provision authorising one of the parties to terminate the agreement if the other is declared insolvent.

## Rejection and disclaimer of contracts in reorganisations

**19 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?**

In controlled management, the debtor is not allowed to reject or disclaim an unfavourable contract. Moreover this possibility is only opened to commissioners after their appointment if the contract was concluded during the suspect period and if the conditions of having such contract declared void are fulfilled (see question 36).

If the contract is simply unfavourable but not voidable, the principle is that all ongoing contracts continue unless the debtor, with the agreement of the delegated judge or the commissioners, decides to terminate it. This termination should comply with the terms and conditions of the contract.

The breach of contract by a debtor may allow the counterpart to claim for damages and in case of success the payment of damages will be privileged at the same rank as the other claims arising after the opening of the reorganisation proceeding.

## Arbitration processes in insolvency cases

**20 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?**

Arbitration might be used to solve disputes regarding agreements signed by the bankrupt company before bankruptcy, in which an arbitration clause was inserted, but insolvency in itself cannot be decided in an insolvency proceeding. New arbitration proceedings would involve the insolvency administrator and, pending arbitration, proceedings at the time of opening of the insolvency proceedings would normally continue after the insolvency case is opened. If the party to an arbitration proceeding launched prior to the insolvency has lodged its claim with the insolvency administrator, the arbitration proceeding would be stayed until the claim is accepted by the insolvency administrator.

## Successful reorganisations

**21 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?**

Commissioners, appointed by the court, shall prepare a plan for the reorganisation of the business of the company. The reorganisation project equitably takes into account all interests at stake, such as the rank of the secured creditors. It must be accepted by a majority of more than 50 per cent of the creditors representing more than half of the liabilities. Then, it shall be ratified by the court. The release in favour of non-debtor parties is not foreseen in the provisions governing reorganisation.

## Expedited reorganisations

**22 Do procedures exist for expedited reorganisations?**

In Luxembourg there is no procedure for expedited reorganisations.

## Unsuccessful reorganisations

**23 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?**

If the reorganisation plan is not approved, either by creditors or by the court, the latter may open the bankruptcy procedure if the conditions for bankruptcy are met. If the debtor fails to perform the plan, the court can also open a bankruptcy procedure upon request of the creditors or on its own motion.

## Insolvency processes

**24 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?**

The first notice is given by the publication in relevant newspapers of an extract of the bankruptcy judgment indicating the timeframe for the creditors' declaration of claims, for the closure of the official report on the admissibility of claims and for the hearing on the disputes arising from the discussion on claim admissibility. The insolvency administrator shall also send a notice to all known creditors to inform them on the timeframe to lodge their claim.

In the case of a sale of real estate property by the insolvency administrator, he or she shall inform all creditors that have declared their claim of the date and time of such a sale.

Eventually, when the bankruptcy is completed, the creditors will be convened by the judge commissioner to discuss the insolvency administrator liquidation's accounts.

The insolvency administrator has no other obligations to inform the creditors. When the case involved many creditors or if the amounts due are huge, the insolvency administrator on his or her own initiative could set up a dedicated website (or publicise in international newspapers) or keep the creditors informed by convening creditors' meetings once a year.

## Enforcement of estate's rights

**25 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?**

The creditors cannot be substituted for the insolvency administrator, only the latter should pursue the estate's remedies. In such case the administrator's fees and expenses are paid by the state. The administrator could also have a contractual arrangement (approved by the judge supervising the bankruptcy) with creditors to have certain expenses paid by them, but in any case the final decision to sue somebody or to start proceedings to void certain transactions belongs only to the administrator.

## Creditor representation

**26 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?**

A law dated 30 June 1930 obliged the judge commissioner to establish an unsecured creditors' committee whose mission is to safeguard the interests of creditors in bankruptcy and composition to avoid bankruptcy. However, this law is rarely applied.

The judge commissioner shall appoint a creditors' committee composed of three members from among the largest unsecured creditors, domiciled in the Grand Duchy or with a head office in this country. They receive no remuneration or compensation for their mandate. The mission of the creditors' committee is to assist the insolvency administrator and supervise the operations of the bankruptcy.

The creditors' committee is purely advisory. The possibility to retain advisers is not foreseen by the 1930 law. However, in practice, this possibility is rarely used.

## Insolvency of corporate groups

**27 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?**

Luxembourg law does not contemplate the insolvency of a corporate group as a whole. Nevertheless, case law shows that for a group of companies with cross-collateralised debts, bankruptcy is generally pronounced on the same day for each Luxembourg company with the appointment of the same insolvency administrator. There is no specific provision in the law, but the administrator will have a general overview and may sell all the assets through an auction (for a real estate property portfolio for example) or may find a more pragmatic solution by talking with the major secured lenders. No pooling is authorised except in specific cases.

The EU Insolvency Regulation 1346/2000 could help in the case of opening secondary proceedings in Luxembourg. In this case, the liquidation boni could be transferred to another EU country.

## Claims and appeals

**28 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?**

The opening judgment, duly published, fixes a time limit to submit the declaration of claim (within a maximum of 20 days but this deadline is not compulsory in practice). The declaration should contain evidence of the claim. The same judgment fixes the court hearing for the verification of claims. This hearing is conducted by the insolvency administrator in presence of the judge commissioner and the debtor with the books of the debtor. A further court hearing allows the creditors to dispute the non or partial admissibility of their claim.

With regards to assignment of claim, the rules of article 1690 of the Civil Code apply, ie, the insolvency administrator shall accept the assignment or be notified by the assignee.

Contingent claims could be accepted when they are certain. A claim acquired at a discount could be accepted at its face value (the discount is generally not known by the administrator) but the amount paid depends on the dividend distributed, generally only a small percentage of the total amount for unsecured claims.

As from the bankruptcy judgment, the interest rates of any unsecured claim shall be stopped with respect to the bankrupt estate. The accrued interest of the secured claims can only be claimed on the sums resulting from the assets assigned to the preferential claim.

## Modifying creditors' rights

**29 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?**

In a bankruptcy proceeding, there is no legal provision allowing the insolvency administrator to change the rank of a creditor. As the rank of creditors is established by the law, it is intangible.

The same rule applies for controlled management and the law foresees expressly that the reorganisation plan should respect the rank of priority of privileged creditors.

## Priority claims

**30 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?**

Once the fees and expenses of the bankruptcy estate have been reimbursed, and once the employee-related claims (super-privileged salaries, ie, last six months' wages amounting to a maximum of six times the minimum social salary or indemnification resulting from the termination of the employment agreement) have been paid, the rank of priorities is as follows:

- employee contribution to social security;
- taxes (direct and indirect);
- employer contribution to social security;
- landlord, pledgor not under the Financial Collateral Law and vendor's privilege; and
- unsecured debts.

No creditor has priority over secured creditors, having security over assets through a pledge agreement or having a mortgage.

## Employment-related liabilities in restructurings

**31 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?**

Pursuant to article L125-1 of the Luxembourg Labour Code the employment contract is terminated with immediate effect if the employer is declared bankrupt. However, according to case law, the insolvency administrator shall follow the normal process of termination of employment agreement, and specific provisions of collective redundancy where applicable. Article L126-1 states the Employment Fund must guarantee wage claims and compensations, arising from employment contracts, due to employees at the date of the judgment declaring the bankruptcy, outstanding from the last six months of work, and those resulting from the termination of the employment contract. Moreover, according to Article 545 of the Commercial Code, these claims and indemnities will be listed as privileged claims at the same rank and in the same conditions as the privilege established in Article 2101 of the Civil Code.

With regards to pension plans, the provisions of the law dated 8 June 1999 apply (see question 32 below).

## Pension claims

**32 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?**

The complementary pension regime is ruled by a law dated 8 June 1999 as amended. It could be put in place through a pension fund or a group insurance. This law states that insurance must cover the insolvability risk and includes the controlled management regime and not only the bankruptcy. The employees are fully covered save for raises granted by the employer during the two previous years.

There is no specific provision with regards to unpaid contributions by the employers, ie, no indemnification of the pension fund or group insurance for the non-payment of contributions.

For the contribution to the legal regime of social security, they are privileged (see question 30).

## Environmental problems and liabilities

**33 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?**

During the normal course of life of a company or an entity exposed to environmental matters, this one should have obtained an administrative authorisation (commodo incommodo) to be in conformity with environmental legislation. At the opening of an insolvency proceeding, the insolvency administrator shall prepare a declaration of termination of activity to the environmental administration. The Luxembourg courts have ruled that it is the insolvency administrator who is liable for this declaration. This declaration could foresee a clean-up and decontamination plan, to be followed by the administrator. The amounts involved will be debts born after the opening of the bankruptcy (privileged but pari passu with similar debts). In practice, with mortgages on the property, the administrator would not be able to pay the cost of cleaning-up.

Luxembourg legislation and case law apply the principle of 'polluter pays'. Finally, the law of 21 March 2012 states that 'the initial producer of waste is responsible for the damage caused by the waste', the holder could also be responsible. If a fault of directors in the application of the environmental law could be proven, the administrator may also sue them. The creditors are not concerned by this liability.

## Liabilities that survive insolvency proceedings

**34 Do any liabilities of a debtor survive an insolvency or a reorganisation?**

**Bankruptcy**

After the closure of the bankruptcy operations for insufficiency of assets, the creditors may undertake their individual actions against the bankrupt entity and the bankrupt property, but if the bankrupt debtor had not also declared itself wrongfully bankrupt or fraudulently bankrupt (see question 38 for criminal provisions) the bankrupt debtor cannot be sued by its creditors, unless it returns to better fortune within seven years of the closure of bankruptcy for insufficiency of assets.

**Controlled management**

The judgment approving the proposed reorganisation plan is compulsory for all creditors who cannot sue the debtor for any outstanding balance.

## Distributions

**35 How and when are distributions made to creditors in liquidations and reorganisations?**

**Bankruptcy**

The remaining amount of the bankrupt's assets, beyond the payment of fees and expenses of the administration of the bankruptcy, other claims borne after the opening of the bankruptcy and the sums paid to secured creditors according to their rank, will be distributed among all admitted creditors pari passu. The insolvency administrator is allowed to pay interim dividend on his or her own responsibility taking into account the existence of secured creditors, the rank of creditors and the making provision for claims not yet admitted but declared.

**Controlled management**

The plan of reorganisation establishes the percentage of distribution by taking into account that the rank of creditors, the fees of the commissioners and those of experts appointed by the court are considered as disbursements, charged to the debtor and are paid by privilege.

## Transactions that may be annulled

**36 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?**

The following transactions undertaken during the suspect period (set by the court, see question 37) and up to 10 days must be declared null and void:

- disposition of assets without consideration of material adequacy;
- payments of debts, which had not fallen due, whether the payment was in cash or by way of assignment, sale, set-off, or by any other means;
- payments of debts, which had fallen due, by any means other than in cash or by bills of exchange; and
- mortgages or pledges granted to secure pre-existing debts.

Any other transactions made during the suspect period may be declared null and void if the insolvency administrator is able to prove that the counterpart had known of the cessation of payments. All acts or payments made to defraud the creditors will be declared null and void, regardless of the date on which they were made.

## Proceedings to annul transactions

**37 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?**

At the issuance of the bankruptcy judgment, the court determines a 'suspect period', starting from the date of the suspension of payment, but not exceeding six months. Only the administrator has the power to act in order to void certain transactions (see question 36 for types of transactions that are voidable).

## Directors and officers

**38 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?**

In general, prudent and diligent directors are not liable for their corporation's obligations. Nevertheless the general tax act mentions in its articles 108 and 109 a responsibility of corporate officers and directors in case of non-payment of taxes and personal fault with a possibility to ask them for payment in place of the company. Case law condemned them if they did not use cash for compulsory tax payment, in case of bankruptcy during the proceeding regardless of the fact that the insolvent company had sufficient assets. The simple fact of not having paid the taxes during the corporate life of the company is constitutive of a fault.

Moreover, directors of companies are liable of the increase of a company's debts if they did not file a petition for bankruptcy within one month of the conditions having been met (see question 12).

Eventually, the directors (ipso jure or de facto) can be subject to the extension of bankruptcy, the action to bridge insufficiency of assets (misappropriation of assets) and, on a criminal side, wrongful or fraudulent bankruptcy (misappropriation of assets, swindle).

## Groups of companies

**39 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?**

Neither Luxembourg law nor EU Insolvency Regulation 1346/2000 have provisions regarding the insolvency of a group. The principle is that any shareholder of a limited company (SA and SARL) is sheltered by a limited liability. Nevertheless, in the event of a bankruptcy, a shareholder of a limited company might be liable for the liabilities of related parties. This is called 'coverage of liabilities' of the debtor by the de facto directors (any entity interfering in the company's operational business, disregarding the competence of the competent management body).

The theory of piercing the corporate veil could also be used to hold a parent company responsible for affiliates' liabilities, for example in the case of misappropriation of assets. But these cases are quite rare.

## Insider claims

**40 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?**

Luxembourg has no specific provisions regarding the right to claim of so-called insiders. Shareholders' loans for instance are not disqualified in equity.

Nevertheless, non-arms' length creditors could fall in the scope of claw-back actions and could be declared null and void.

## Update and trends

**Bill of law**

The Luxembourg government filed a new bill of law (Bill No. 6539 (the Bill)) on the protection of undertakings and the modernisation of insolvency law on 1 February 2013. It provides for measures to prevent financially distressed undertakings from being declared bankrupt should their financial problems be detected at an early stage.

The Bill aims to modernise the Commercial Code and to set new rules in order to identify financially distressed undertakings more efficiently. Once identified, should the Bill be adopted, accurate reorganisation proceedings will become available for such financially distressed undertakings. An undertaking will then be able to propose to one or several of its creditors an amicable settlement to restore its finances or to provide for its reorganisation. A new administrative winding-up proceeding without liquidation will also be available. Such administrative winding-up proceeding will be opened by the manager of the Trade and Company Register and will allow the more efficient and less costly liquidation of companies that do not have any employees and whose assets do not exceed a threshold determined by Grand-Ducal Regulation or companies that infringe the provisions of the law on commercial companies.

In addition, judicial reorganisation will be more attractive.

**Cross-border cases:**

Arm Asset Backed Securities (Arm Asset) is a securitisation undertaking organised under Luxembourg law, which, as such, was required to be authorised and supervised by the Luxembourg Financial Regulator (Commission de Surveillance du Secteur Financier (CSSF)). On 29 August 2011, the CSSF declined to grant a licence to Arm Asset, thereby requiring it to refrain from taking any action other than protective measures, unless authorised by the supervisory commissioner.

Arm Asset started legal proceedings before the First Instance Administrative Court to dispute the decision of the CSSF. The decision was confirmed by a judgment dated 6 December 2012 and the Administrative Court of Appeal confirmed this judgment on 21 August 2013.

On 8 October 2013, Arm Asset filed a petition for its winding-up before the High Court of Justice in London and on 9 October 2013, the High Court of Justice, recognising that the COMI of Arm Asset is located in England, appointed two joint provisional liquidators. As the decision to refuse granting the licence had been confirmed, the CSSF, in accordance with applicable provisions of Luxembourg law on securitisation, required the public prosecutor to file a petition in Luxembourg to obtain the judicial dissolution and liquidation of Arm Asset. The public prosecutor lodged a request to this effect on 6 February 2014.

The court, in accordance with articles 16 and 3 of the European Insolvency Regulation 1346/2000, noted that it was bound by the decision of the High Court of Justice dated 9 October 2013 and by its consequences, particularly by the fact that the joint provisional liquidators had been granted the widest powers to act in the best interest of the company and of its creditors. The court therefore decided to suspend its decision on the public prosecutor's application until after the closure of the winding-up proceeding decided by the High Court of Justice.

**Major cases**

Espirito Santo Financial Group, Rio Forte and Espirito Santo International filed for creditors' protection under Luxembourg law. The three entities have filed petitions in order to be placed under controlled management. The petitions have been declared admissible by the Commercial Court and a delegate judge has been appointed. A report will be prepared by the delegate judge with the help of two experts (one lawyer and one auditor) appointed by the court. The court will later on decide on the merits of the petitions and will either place the companies under controlled management or reject the requests and place the companies under bankruptcy.

## Creditors' enforcement

### 41 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

The Financial Collateral Law ensures that national and foreign insolvency procedures and reorganisation measures do not affect the enforceability of the pledge. As a result, it is forbidden for the commissioner, liquidator and receiver to set the collateral aside; and the secured creditor is allowed to enforce its pledge (or any collateral) without having obtained any consent of the insolvency administrator or the court even without giving prior notice.

## Corporate procedures

### 42 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

The formal liquidation of a Luxembourg commercial company is governed by the law on commercial companies of 10 August 1915 as amended. This procedure requires a general shareholder's meeting to decide to wind up the company and put it into liquidation. Following the decision to dissolve the company, one or several liquidators are appointed to manage the liquidation of the company. After the final general shareholder's meeting, the company shall be definitively liquidated and will be struck off the trade register. The duties of the liquidator are quite similar to the duties of an insolvency administrator (ie, realise the assets and pay the creditors on the assets, but in a corporate voluntary liquidation, all creditors shall be reimbursed).

## Conclusion of case

### 43 How are liquidation and reorganisation cases formally concluded?

**Bankruptcy**

The assets of the bankrupt company shall be managed by the administrator and divided between the creditors, taking into consideration their respective privileges and rank (see question 30), under supervision of the judge in charge of the bankruptcy (judge commissioner). Once all funds have been paid, an application is filed with the court for the termination of the bankruptcy proceeding, on the condition that all payments bound to be made were used. Then, the court declares the closing of the bankruptcy.

**Controlled management**

For reorganisation, if and when the plan is approved by the court, it becomes compulsory for the business entity, all its creditors, co-debtors and guarantors. The sale of assets is fixed in the plan and different proportions are paid at different times to creditors, taking into consideration the nature, the size of their debts, pledges and mortgages or other guarantees. The court can also not interfere in the execution of the plan which has been approved. If the plan is unsuccessful, the court may terminate it and declare the company bankrupt. The court may also decide to reject the plan and dismiss the application for a controlled management procedure. In this case, it may open the bankruptcy procedure if the conditions for a bankruptcy are met.

## International cases

### 44 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

The UNCITRAL Model Law has not been adopted and it is not planned for the future.

**Recognition of foreign judgments under the scope of the EU Insolvency Regulation**

An insolvency proceeding starting in another member state will be automatically recognised in Luxembourg. Based on provisions of the EU Insolvency Regulation 1346/2000, foreign main insolvency proceedings opened in a member state of the European Union will be recognised immediately in other member states.

**Recognition of foreign judgments outside the scope of the EU Insolvency Regulation**

Luxembourg applies the principles of unity and universality. Foreign judgments are recognised in Luxembourg if they are lawfully made judgments and if the judgment itself may have international effects in the jurisdiction of origin (ie, if the country where the judgment has been issued applies the territoriality principle, the judgment cannot have effects in Luxembourg without prior proceedings in Luxembourg). There is no condition of reciprocity. If the foreign insolvency administrator wishes to enforce the foreign judgment in Luxembourg, an enforcement order (exequatur) is required.

Foreign creditors are treated equally to local creditors in insolvency proceedings opened in Luxembourg.

## COMI

**45 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?**

Luxembourg decisions are largely inspired by *Eurofood* (C-341/04 of 2 May 2006). The Luxembourg Court of First Instance (TA Lux, 9 February 2007, No. 105710) held that 'in order to locate the centre of main interests, one needs to establish a body of concordant indicia, such as the place of the board of directors meetings, the law governing the main contracts, the location of the business relations with the customers, the place where the commercial policy is defined, the location of the creditor banks and the centralised management of the purchasing policy, the staff, the accounting and the technology system'. The Court of Appeal held that the COMI of a company was located in France (CA Lux 12 November 2008). In this decision, the court focused on the location of the company's infrastructure and on the elements showing the place where the company exercised its business activity and managed its customer and supplier relationships. The Court of Appeal gave less importance to elements such as the place where the board of directors met or the place where the company received mail or the fact that some suppliers still invoiced the company at its registered office.

There is no case law regarding the COMI of corporate group of companies.

## Cross-border cooperation

**46 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?**

Luxembourg courts, even if there are only a few cases, generally have no problem in recognising the opening of a main proceeding in another member state (CA Lux 2 December 2009, No. 34882 and TA Lux No. 447/08, 28 March 2008).

Luxembourg faced major international insolvency cases during the past decade (*Icelandic banks*, *Lehman Brothers*, *Madoff*) mainly in the financial sector, but also in 2014 with Espirito Santo Luxembourg holding companies. The courts have always cooperated with other countries. The fact that Luxembourg judges generally speak French, German and English obviously makes cross-border communication easier. In the *Madoff* cases the liquidators were obviously in touch with their US counterparts, and it was the same for *Lehman Brothers*. Regarding *Landsbanki*, there were some difficulties for the public prosecutor and the insolvency administrator to accept the fact that criminal investigations should be made; it was not exactly a refusal to cooperate but a different perception of the facts.

## Cross-border insolvency protocols and joint court hearings

**47 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?**

The most recent and relevant case is *Lehman Brothers*, where a cross-border insolvency protocol for the Lehman Brothers Group of Companies was established by various entities of the group (worldwide) and the Luxembourg judiciary liquidators requested the court to modify the liquidation judgment in order to allow them to adhere to this protocol. The court agreed for the provisions that did not conflict with Luxembourg public order. In any case, Luxembourg was a pioneer in the 1990s when the various entities of BCCI group signed a pooling agreement despite the opening of insolvency proceedings.

No joint court hearings were initiated by Luxembourg courts.


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