The Restructuring Review

Seventh Edition

Editor
Christopher Mallon

Law Business Research

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THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

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EDITOR'S PREFACE

I am very pleased to present this seventh edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2014 and 2015 and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

In many jurisdictions the general economic trends are now more positive than they have been for many years. Against this background, the trend of diminished large-scale restructuring activity has continued in many markets. This picture may suggest a global economy in robust health after the long and difficult years of recession but it would be naïve to think that stability has returned for the long term as several warning signs remain.

First, the dramatic growth of high-yield issuances of past years may lead to unknown consequences further down the road. In the United States, 2012 and 2013 were each record years for high-yield issuance, and across the Atlantic this market is finally achieving a similar stage of development. At the time of writing, total European high-yield issuances for 2014 had already surpassed the annual totals for every year before 2013, and Credit Suisse was forecasting a record level of issuances for the year. As has happened in the past, it is inevitable that such large increases in economic activity will include inappropriate or unfortunate deals, the effects of which will need to be unpicked in future years with the help of restructuring professionals. The same will no doubt apply to the surge in M&A activity that has recently been observed in many developed economies.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. There remains considerable uncertainty as to the broader economic effects when quantitative easing is unwound and when interest rates return nearer to the long-term average; many commentators expect that when the monetary tide retreats many businesses that until now have managed to conceal their weaknesses may be left dangerously exposed.

With the above in mind, and taking into account also the stresses that continue to lie beneath the surface in the eurozone and some worrying signs of instability in the emerging economies, only the very brave would forecast a prolonged period of calm for the global economy. As such, this work continues to be relevant and important, in particular as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this Review would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2014

Chapter 16

LUXEMBOURG

Martine Gerber-Lemaire[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

Both the OECD, in its economic forecast summary issued in May 2014, and the IMF, in its concluding statement for Luxembourg issued in March 2014, stated that Luxembourg's economic growth will continue to pick up in 2014, although it will face several challenges. The two main challenges are related to the future revenue losses caused by the introduction of the new EU VAT regime for e-commerce, which could, however, be balanced out by a 2 percentage-point increase of the standard VAT rate on commercial transactions, and the adaptation of the tax framework to the requirements of the EU. In addition, to sustain long-term economic growth, the Luxembourg government should also focus on reforming the current pension and wage indexation systems. In an effort to become Europe's model student, Luxembourg signed the intergovernmental agreement with the United States in the larger context of the implementation of FATCA by more than 60 jurisdictions worldwide. This is part of an evolution towards the automatic exchange of information between tax authorities as an emerging international standard.

On 2 April 2014 the new political coalition, led by Prime Minister Xavier Bettel, reiterated the government's willingness to reinforce the country's overall competitiveness, performance, efficiency and business attractiveness. The government will strongly support the financial services industry, the ICT business, the logistics sector, as well as the eco and bio-technology industries.

The unemployment rate has reached 7.1 per cent, compared with 6.9 per cent in 2013, mainly due to the continuing fall of employees in the financial sector despite the arrival of new Chinese banks in Luxembourg. Public debt reached 23.1 per cent of GDP, and it will be a major challenge to try and reverse this upwards trend.

1 Martine Gerber-Lemaire is a partner at OPF Partners.

The number of bankruptcy proceedings opened between April 2013 and March 2014 reached 1.076, which represents an increase of 5 per cent compared with the same period a year earlier. The sound health of Luxembourg's financial sector is attested to by the fact that only a SIF[2] and two SICAR[3] judiciary liquidations were pronounced in 2013.

The Bill of Law introduced on 1 February 2013, meant to modernise the current insolvency regime by mainly focusing on pre-insolvency and reorganisation measures, has not yet been approved but should be passed in 2014.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Commercial sector

Reorganisation procedures

Controlled management, reprieve from payments and composition with creditors to avoid bankruptcy are the three restructuring procedures available in Luxembourg. Until now, they have been rarely applied in practice as the court has been reluctant in granting the opening of such procedures, except for controlled management if a major player of the Luxembourg economy was concerned (approximately two controlled management cases are opened per year – in 2012, however, no cases were opened).

According to the Grand-Ducal Decree dated 24 May 1935, controlled management may apply where the company is either unable to raise credit or unable to meet its commitments. The court grants this procedure only when it appears that the business of the company may be resumed and the company may be rescued later on.[4]

Controlled management allows an entity to reorganise its business or realise its assets under the supervision of the court and the court-appointed commissioner. It is the commissioner's task to draw up a reorganisation plan, which will then be subject to approval by a majority of creditors and ratification by the court prior to becoming compulsory.

There is no real culture of a 'fresh start' in Luxembourg, which may explain why this option is often rejected by the court, but in the case of companies that employ a sufficiently large number of employees it has been applied.

Bankruptcy

In Luxembourg the most commonly used insolvency procedure is bankruptcy. In 2012 the number of registered bankruptcy cases reached an unprecedented high of 1,026 cases. Bankruptcy can be initiated at the request of any creditor, the company or by the court acting on its own motion. It is declared by means of a court judgment if both of the following conditions are fulfilled:

2 Specialised investment fund.

3 Investment company in risk capital.

4 See Court of Appeal Luxembourg, 9 July 1980, *WB/Halubek Associates*.

a the debtor's credit is compromised (i.e., the debtor can no longer raise credit either from banks, providers or its owners); and

b the company has stopped paying its debts.[5]

Therefore, neither the cash-flow test nor the balance-sheet test (recommended by INSOL or UNCITRAL) is deemed sufficient under Luxembourg law to ascertain whether the company should be declared bankrupt.

The court appoints a bankruptcy receiver, who will act, under the supervision of a *juge-commissaire* appointed by the court, in his or her capacity as a representative of both the insolvent company and the general body of creditors.[6]

On the one hand, the assets of the business entity will be sold by the bankruptcy receiver and divided between the creditors, taking into consideration their respective privileges and rank.

On the other hand, all of the bankrupt's passive debts become receivable as from the judgment declaring the bankruptcy, while the bankrupt debtor is at the same time deprived of the benefit of the expiration date.[7] The interests attached to any debt not guaranteed by a privilege, collateral or a mortgage will be stopped with respect to the general body of creditors.[8] Legal actions filed by creditors in order to seize the debtor's property are suspended as from the judgment date.

Hence, the role of the bankruptcy receiver is not to manage the bankrupt company as a going concern, but to realise the assets of the company and pay off its debts to the largest extent possible.

In addition, as a general rule, bankruptcy also prevents the creditors from acting separately against the bankrupt debtor.[9]

Informal methods of restructuring companies in financial difficulties

Luxembourg legislation does not foresee out-of-court arrangements that could be homologated by the court.

Nevertheless, distressed companies may avoid debt maturity concerns by entering into an 'amend-to-extend' transaction, whereby they effectively restructure their revolving credit and term loan facilities through loan modification amendments that extend payments and debt maturity. Lenders may also agree to take control and replace part or all of their debt in exchange for equity (debt-equity swap). Private equity houses, in order to keep their investment, may buy back part of their debt or inject their substantial cash reserves ('dry powder').

Moreover, the restructuring strategy that foresees the transfer of the target group under a safe new holding structure controlled by the lenders, the existing re-investing sponsors or the new investors is often seen as a real alternative through the enforcement

5 Article 437 of the Luxembourg Commercial Code.

6 Article 444 of the Luxembourg Commercial Code.

7 Article 450(1) of the Luxembourg Commercial Code.

8 Article 451(1) of the Luxembourg Commercial Code.

9 Article 452 of the Luxembourg Commercial Code.

of a financial collateral arrangement governed by Luxembourg law or through a centre of main interests (COMI) shift.

Further to the *Coeur Défense* case law,[10] the setting up of a 'double Luxco' structure should prevent paralysing the lenders' recourse and the enforcement of the security interests. The purpose of the structure is to:

a prevent having the COMI of the Luxembourg companies ascertained by third parties in another country;

b ensure that the shares of Luxembourg companies remain located in Luxembourg, as Article 5 of EU Regulation 1346/2000 gives protection to a security interest located abroad;

c allow the lenders to enforce by appropriation a Luxembourg law share pledge granted by a Luxco; and

d take control of the Luxembourg company and sell the assets of the group.

Specific issues

Collateral arrangements

The Luxembourg Financial Collateral Law (the Collateral Law)[11] provides the most efficient legal framework in the European Union as it perfectly reflects the Collateral Directive's main goal of facilitating and accelerating the enforcement procedure of collateral arrangements to preserve financial stability and avoid contagion in the event of default. In fact, one of its main strengths consists in the broad range of enforcement procedures offered to lenders.

According to the Collateral Law, if pledge agreements are entered into during the preference or 'clawback' period,[12] they can no longer be challenged on the basis of insolvency voidness. This protective measure is extended regardless the nationality or place of business of the company which has granted the pledge, and, the Collateral Law sets aside any revocatory action open to a creditor or a receiver in Luxembourg or abroad.

Recently,[13] the Luxembourg legislator has improved the efficiency of the Collateral Law by filling remaining loopholes. One of the main improvements provides that the pledgor can pre-emptively and irrevocably waive any right of subrogation or recourse it may have.

Directors' liability

The liability of directors of Luxembourg holding companies plays an important role in case these companies face financially challenging times. As a matter of fact, directors should safeguard the interests of the endangered company within a risk management period. The directors must assess the potential risks for the company while verifying

10 Versailles Court of Appeal (the Court). On 19 January 2012 the Court's ruling was delivered after the case was referred back to the lower court from the Court of Cassation, and it confirms the opening of French safeguard proceedings for both the French borrowing company and its Luxembourg parent company.

11 Law dated 5 August 2005 on financial collateral arrangements as amended.

12 Article 20(4) of the Financial Collateral Law.

13 Law dated 20 May 2011.

that the conditions for bankruptcy under Luxembourg law are not met, as one of their main legal duties when the company faces financial difficulties is to file a petition for bankruptcy with the commercial court within one month from the date the company has suspended its payments.

The directors will generally be held liable under contract or in tort if they have wrongfully continued the activities of the company while in financial distress or did not timely file the petition for bankruptcy.

The public prosecutor can also sue the directors for criminal liability and mainly in the event that they fail to file a bankruptcy petition in a timely manner.

Finally, the creditors may launch an action to bridge insufficient assets in the event of serious and characterised faults committed by the directors and that contributed to the company's bankruptcy. In such an event, the court may decide to hold the directors responsible for the corporate losses as joint or separate debtors.

However, apart from civil liability, those directors who act professionally are not normally held liable for criminal reasons, as they cannot be blamed for the company's financial problems.

Clawback period

As in other countries, Luxembourg applies the concept of the clawback period, even if in a less intrusive way than in the United States. In principle, the court determines the date of 'cessation of payments' six months prior to the opening of bankruptcy. The period from the determined date plus 10 days until the bankruptcy declaration is referred to as the preference period.[14]

The following transactions must be declared null and void by a court decision, if they were undertaken during the preference period:[15]

a disposition of the assets without consideration of material adequacy;

b payments of debts that had not fallen due, whether the payment was in cash or by way of assignment, sale, set-off, or by any other means;

c payments of debts that had fallen due, by any means other than in cash or by bills of exchange; and

d mortgages granted to secure pre-existing debts.

Any other payments made by the debtor that have fallen due, and any other transactions entered into during the preference period, may be declared null and void if the bankruptcy receiver can prove that the persons receiving payment from the debtor (or the persons entering into a transaction) were aware of the cessation of payments.[16]

Finally, there is a general principle that all acts or payments made to defraud the creditors will be declared null and void, regardless of the date when they were made.[17]

14 Article 442 of the Luxembourg Commercial Code.

15 Article 445 of the Luxembourg Commercial Code.

16 Article 446 of the Luxembourg Commercial Code.

17 Article 448 of the Luxembourg Commercial Code.

ii Restructuring and insolvency proceedings applicable to entities within the insurance and financial sectors

In Luxembourg, the restructuring of entities within the financial sector is governed by Articles 60 and 61 of the Law of 5 April 1993[18] on the Financial Sector (LSF). With regard to the liquidation of an insurance company the applicable rules are substantially the same as those provided in the credit institutions regime of insolvency.[19]

The LSF's sole reorganisation proceeding to date is the suspension of payments.[20] Most of the measures currently used to curb the effects of the financial crisis are outside the scope of the 1993 Law (for instance, the acquisition of the concerned professional of the financial sector (PFS) by another credit institution or a merger with another company).

The aim of the suspension of payments is to ensure the bank's financial situation does not deteriorate or to grant sufficient time for such legal body to cope with its financial difficulties. The Luxembourg financial regulator (CSSF) will in this case supervise the company's management while the market, creditors and customers are spared from liquidation proceedings.

Suspension of payments may be initiated (1) where the establishment is unable to raise credit, whether or not it is also unable to pay creditors, (2) where the establishment is unable to meet its commitments and (3) where the authorisation required to act as a professional of the financial sector has been withdrawn and the withdrawal decision has not yet become final.

Only the CSSF or the concerned establishment are entitled to apply for suspension of payments (not the creditors). In 2012, the CSSF withdrew the authorisation issued to 13 SIFs, due to non-compliance with legal requirements.

The main legal effect of the opening of such procedure consists in the suspension of all payments, except those required by the liquidation proceedings, for a maximum of six months.[21] The lodging of the request by the establishment or the notification made by the CSSF prohibits the establishment from taking any actions other than precautionary and protective measures.

By means of a judgment, the court appoints one or several administrators to control the management of the PFS's assets and its use. It may also assign some of the following duties to the administrator:

a list all the assets and liabilities of the PFS;
b determine whether a reorganisation of the PFS is foreseeable; and
c if the reorganisation is possible, prepare a reorganisation plan taking into account the rank of privileges to be approved by the majority of creditors.

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18 The Law of 5 April 1993 on the Financial Sector as amended; www.cssf.lu/fileadmin/files/Lois_reglements/Legislation/Lois/L_050493_lsf_upd120713.pdf.

19 These rules will not be covered in this chapter as a new law should come into force next year and in Section III.ii, *infra*, the first recent case of a judicial liquidation concerning an insurance company is referred to.

20 For wider development on this issue, see Marc Elvinger, 'Enseignements jurisprudentiels récents en matière de sursis de paiement dans le secteur financier', *ALJB – Bulletin Droit et Banque No. 43*.

21 Decision of 10 February 2009, No. 183/09.

Therefore, if the tasks above are carried out, the suspension of payments may lead to the homologation of a reorganisation plan.

If the business of an entity within the financial sector cannot be resumed or pursued in accordance with the suspension of payment proceedings, the second procedure available under the LSF is the judicial liquidation and dissolution of the establishment. Once the judicial liquidation has been opened by the court, the court appoints a *juge-commissaire* from among its members and generally two liquidators (a lawyer and an auditor). The court also grants the liquidators the right to appoint a creditors' committee in order to assist and supervise the work performed by the liquidator. In a judicial liquidation, the court determines to what extent the rules governing bankruptcy will apply (which is generally the case).

iii Restructuring and insolvency proceedings applicable to undertakings for collective investment

The rules related to the liquidation proceedings of undertakings for collective investment (UCIs) are governed by the Law of 17 December 2010 (the 2010 Law), and depend on the concerned type of UCI: incorporated investment companies (SICAV and SICAF) or a contractual scheme (FCP).[22]

Under the 2010 Law, the judicial winding up of a UCI or one or more of its compartments is restricted to three specific situations, specifically framed for investment companies:

a when a UCI does not apply for registration with the CSSF within one month of the date of its incorporation;

b when the CSSF unconditionally refuses to register a UCI; and

c in the event of an unconditional withdrawal of a UCI's registration from the CSSF's list.

Only the public prosecutor, *ex officio* or at the request of the CSSF, can request a judicial winding up.

The withdrawal of a SICAV or a SICAF from the CSSF's list automatically leads to a suspension of payments by the UCI[23] and a prohibition from taking any measures, other than protective measures, except by authorisation of a 'supervisory commissioner'.

The decision of the CSSF becomes final only when the delay for administrative recourse against the CSSF decision has elapsed. Then the Luxembourg court formally pronounces the judicial winding up of the UCI. The court may use its discretion and decide to apply the general law relating to commercial companies (voluntary liquidation of a solvent company as per the Company Act rules). Usually, however, the court requests the combined application of commercial bankruptcy rules, with some specific rules of the Company Act in relation to voluntary liquidation.

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22 *Fonds commun de placement* (FCPs) means any undivided co-ownership of securities managed in accordance with the risk principle spread between owners who have limited liability and whose rights are represented by units intended to be placed with the public.

23 Redemption of shares is no longer possible. Also see *Tribunal d'Arrondissement de Luxembourg*, 30 April 2009, No. L-6089/09 *Luxembourg Investment Funds SICAV*.

Once the judicial winding up of the UCI is opened, the appointed liquidators analyse the situation, review the creditors' claims, realise the assets and pay the debts. Finally, the liquidator closes the judicial winding up and, if possible, distributes to shareholders their due shares in the net asset value of the wound-up company.

III RECENT LEGAL DEVELOPMENTS

i Legislative changes

Commercial sector

Bill 6539 includes measures that aim at preventing a company's potential financial difficulties. Luxembourg's Minister of Justice, François Biltgen, stressed that, despite bankruptcies being impossible to avoid in a competitive market economy, a set of rules should help prevent financially distressed companies from being declared bankrupt if their financial problems are detected at an early stage.

Bill 6539 covers four aspects:

- *a* The preventive aspect, inspired by Belgian law, which provides conservative measures to prevent distressed entities from being automatically declared bankrupt.
- *b* The repair aspect, which, after closure of insolvency proceedings, grants a second chance to unlucky traders acting in good faith who are not to be considered as the debtor of the remaining liabilities of the company.
- *c* The repressive aspect, which aims to prevent merchants acting in bad faith by neglecting a business in order to start a new one simply escaping with total impunity. The Bill also intends to remove fraudulent bankruptcy from the crimes category of Luxembourg criminal law so as to facilitate prosecution, this being challenged by the Chamber of Commerce. Furthermore, the Bill aims at introducing an administrative liquidation proceeding to dissolve a company without any assets, registered office, or directors, or that has failed to file its annual accounts (administrative liquidation) in order to avoid the high procedural costs imposed by a judicial winding up (judicial liquidation).
- *d* Finally, the labour planning aspect, which protects employees during reorganisation proceedings.

In order to identify a financially distressed undertaking, several different types of data need to be collected[24] and centralised by the Economic Situation Committee and by a unit assessing the distressed undertaking (CEvED), which must be created by law. The CEvED is in charge of analysing the data, informing the company and asking it to provide information as to potential reorganisation measures. The debtor may ask the Ministry of Economy to appoint an undertaking conciliator.

Bill 6539 also introduces rules to facilitate the action to bridge insufficient assets by having directors fill the gap if they were negligent; however, some voices refuse this

24 Data collected by the Central Balance Sheets Office, judgments, list of protest, notification of economic redundancy, debt owed to Social Security Centre or tax administrations.

modification, which is incompatible with the idea of a 'fresh start'. It is worth noting that Bill 6539 would not affect the protective rights of collateral creditors granted by the law implementing the collateral directive.

The Bill also intends to establish bankruptcy receivers as a profession, having had a look at the proposal of Insol Europe in relation with the profession of Insolvency Practitioners.

Bill 6539 should ultimately be an interesting tool for financially distressed local entities and traders but it is not tailored to international groups whose holding companies are located in Luxembourg with secured debts guaranteed by Luxembourg security and commercial companies outside Europe.

Insurance sector

Bill 6456 is meant to implement the Solvency 2 Directive into Luxembourg law. The Bill will affect the insurance supervisory authorities and reinsurance companies as well as the companies themselves, as it foresees a fundamental review of their capital adequacy regime. The three pillars of Bill 6456 are:

a the enhancement of governance and risk requirements to increase the level of the required internal organisation;

b the organisation of periodic information to be submitted to the insurance regulator and the public; and

c solvency and capitalisation requirements, which will apply similarly to all undertakings, with the aim of having a new individual risk-based approach.

These pillars are preventive measures for the purpose of avoiding financial difficulties. A new chapter foresees reorganisation measures and liquidation measures for the insurance sector. Compared with the present law, the main difference consists in the fact that it will cover not only Luxembourg entities but also insurance companies with their registered seat in another EU Member State, with rules governing conflict of laws. The rules governing commercial companies have, however – and rather obviously – been excluded, as a set of rules specific to the insurance sector will be put in place, governed by the principles of unity and universality.

Finally, the new Bill 6456 is still under review with no new comments since April 2013.

The *Excell Life* case was the first life insurance case to take place in Luxembourg in this century. This lengthy case started in summer 2011 when the insurance regulator (CAA) requested that Excell Life International stop entering into any new agreements and reimbursing shareholders for six months. This request was renewed on February 2011 for two months but dismissed in April 2011 further to the insurance company's increase of capital, which improved its solvency.

Excell Life, nevertheless, continued to act negligently without any possible means of raising funds provided by institutional investors. Therefore, in November 2011, Excell Life received an official reprimand from the CAA. On 5 June 2012 Excell Life's business licence granted by the CAA was revoked and on 12 July 2012 judicial liquidation proceedings were opened.

Apparently, the insurance company was fraudulently managed and involved some judicial actions launched by the clients against the CAA, along with a European criminal investigation.

Luxembourg has always been considered as one of the safest jurisdictions in terms of the sale of life insurance, due to the following legal requirements (known as the 'Triangle of Security'):

a all clients' assets must be held by an independent custodian bank approved by the CAA;

b a deposit agreement is signed by the life insurance company, the custodian bank and the CAA; and

c this mechanism, ensuring the segregation of assets and the custodian bank, is required to ring-fence assets and is bound by the regulator's powers to protect the assets on behalf of policyholders.

The *Excell Life* case will test the Luxembourg life insurance sector. The CAA has been blamed for not having properly protected Excell Life's clients and has consequently come under the spotlight, just as the CSSF did in *Madoff*. As a matter of fact, the judicial liquidation will not particularly affect clients that entered into the 'branche 21' agreements linked to deposits. On the other hand, it will have negative consequences for clients that entered into 'branche 23' agreements, linked to fraudulent investments, as they will certainly not be reimbursed.

A first dividend was paid at the beginning of 2014, but several creditors have not been fully admitted as creditors by the liquidators. Due to the various criminal investigations, it appears that the liquidation will not be closed promptly.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

Luxembourg is widely used as a platform for the structuring of international groups, but it is also used for group restructurings. The latter is mainly true when a group's holding company is situated in Luxembourg or a special-purpose vehicle (SPV) is specifically incorporated to support a group facing financial difficulties. Quite a few restructurings took place during the second half of 2012.

The most recent restructuring that was achieved in May 2014 concerned 3W Power SA, with a financial restructuring plan including a debt-equity swap of 50 per cent of the outstanding bonds nominal (€100 million), the issuance of a new €50 million bond and a cash capital increase of €4 million.

A second interesting case is that of Alteco/Mag Import, involving two Spanish companies that entered into a syndicated facility agreement in order to acquire Gecina SA (a French-listed company), secured by a Luxembourg pledge over the shares of Gecina. Following a default payment at maturity, an insolvency proceeding was opened in Spain against Gecina. Before the opening of this procedure, Alteco and Mag Import decided to enforce their pledge (default at maturity date), but in the meantime the Spanish insolvency receiver brought a clawback action against the enforcement of the Luxembourg pledge and the Spanish court suspended the enforcement. The pledgees therefore requested that the Luxembourg court acknowledge the validity of the enforcement, which was ruled on in January 2014, confirming the appropriation of shares by the pledgees. The outcome of these two contradictory decisions is awaited, which is of the utmost importance for Luxembourg, as they demonstrate the 'bankruptcy immunisation' of the pledges under collateral law.

These transactions also highlight the key role played by Luxembourg's legal and tax framework in order to implement successful reorganisations.

V INTERNATIONAL

On 12 December 2012, the European Commission submitted a proposal (the Proposal) to amend Regulation (EC) 1346/2000 on insolvency proceedings (the Regulation).

This Proposal is the result of a consultation of legal stakeholders and the requests of practitioners including judges. The current EU Regulation has been criticised because:

a restructuring measures at a pre-insolvency stage are not covered;
b insolvency forum shopping becomes a source of instability for creditors;
c secondary proceedings are not strictly independent from the main insolvency proceedings;
d there was no online publicity of the decision at a European level; and
e groups of companies are not taken into consideration as a whole.

On 20 December 2013, the European Parliament issued a report with recommendations to the Commission on the Proposal. The most important point addressed was the one concerning groups of companies, the Commission having adopted an approach on enhancing the coordination and communication between insolvency practitioners and courts. The Parliament goes a step further, proposing the appointment of a coordinator who will not only identify and outline recommendations for a coordinated conduct of the insolvency proceedings, but also present a group coordination plan that identifies, describes and recommends a comprehensive set of measures to the resolution of the group members' insolvencies; this coordination plan needs to be approved by a court, but insolvency representatives have the opportunity to comment on the plan prior to approval. The group coordination plan is not, however, binding on insolvency practitioners, who can deviate from such plan.

The Parliament also reinforces the protection of local creditors with or without opening secondary proceedings. It proposed that the EU register should be embedded in the e-justice portal.

The modernisation will certainly be welcomed with respect to issues related to secondary proceedings, reorganisation measures, publicity and the insolvency of groups. Nevertheless, the Proposal will not completely prevent forum shopping despite the fact that the Court of Justice of the European Union rulings are incorporated in it.

VI FUTURE DEVELOPMENTS

As Luxembourg has recently been backed into a corner, it places greater emphasis on improving its financial reputation (no longer banking secrecy). The new government would like the financial sector to remain strong and has put a strong structure place with the creation of a new partnership regime, which should allow it to compete with the legal flexibility of the United Kingdom, and the AIFMD is a great opportunity to enhance Luxembourg's financial security. In the meantime, 11 new banks have established themselves in Luxembourg in less than one year (several from China but also from Brazil and some European other countries). With the attractiveness of Luxembourg as a finance hub for the eurozone, the country has become one of the largest pools of renminbi accounts in Europe in terms of deposits, loans, listed bonds and assets in mutual funds; a report by PricewaterhouseCoopers mentions that Luxembourg already serves as the entry point for Chinese investors into the eurozone and, conversely, as a conduit for European investment into China.

Luxembourg has also started to move in new economic directions by developing new sectors such as ICT, logistics or eco-technologies. In an entirely different area, Luxembourg is also well advanced in the space sector at different levels, with a fleet of more than 50 commercial satellites registered in Luxembourg.

The government is also supporting the local economy by launching the €1 company for small and medium-sized markets as well as the private foundation to protect and secure family and business estates.

Even though Luxembourg climbed two places in the latest IMD World Competitiveness Yearbook 2014,[25] now being ranked 11th out of 60, the IMD has highlighted the following challenges for Luxembourg:

a reining in the inflation gap compared with its main economic partners;

b cutting red tape;

c diversifying the economy;

d consolidating public spending; and

e reforming the pension systems.

25 www.imd.org/news/2014-World-Competitiveness.cfm.

Appendix 1

ABOUT THE AUTHORS

MARTINE GERBER-LEMAIRE

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Martine Gerber-Lemaire is a partner and heads OPF Partners' restructuring and insolvency practice. She is also a member of the firm's management board.

She has vast expertise across a number of key restructuring and insolvency areas, particularly with regards to exits including voluntary liquidations and 'destructuring' as well as matters relating to European insolvency law. She regularly applies EU Regulation 1346/2000 on cross-border insolvency cases. Ms Gerber-Lemaire has been involved in major cross-border reorganisations for international groups (e.g., ECM, Orco, Panrico and major real estate groups active in Germany) and has also defended Madoff investors and Landsbanki creditors. Furthermore, she has organised COMI shifts for companies that had a higher chance of being saved in other Member States in which they own real estate.

Ms Gerber-Lemaire is recommended in various legal guides for her restructuring and insolvency expertise, including *Chambers Europe* and *The Legal 500*.

She is a regular speaker at many domestic and international events and contributes regularly to various international legal and insolvency publications. She has been a member of the Luxembourg Bar since 2004 and is also a member of the Council of INSOL Europe and IBA. Prior to joining OPF Partners, Ms Gerber-Lemaire worked with Deloitte in its London and Luxembourg practices, where she was a partner in the legal department. In this role, she was responsible for liquidations of various regulated entities (e.g., banks, insurance companies).

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