Luxembourg

Constantin Iscru and Xavier Guzman

DLA Piper Luxembourg

GENERAL

Legislation

1 What main legislation is applicable to insolvencies and reorganisations?

The Luxembourg Code of Commerce contains the rules applicable to bankruptcy. The suspension of payments was introduced by the Grand Ducal Decree dated 4 October 1934, which has since been codified into the Luxembourg Code of Commerce. The pre-bankruptcy composition with creditors is governed by the law of 14 April 1886, as amended. The Grand Ducal Decree dated 24 May 1935 includes the provisions relating to controlled management, whereas the involuntary (judicial) winding-up is regulated by articles 1200-1 and 1200-2 of the Law of 10 August 1915 on commercial companies, as amended.

On 1 February 2013, the government filed the draft bill 6539 on the preservation of business and modernisation of bankruptcy law. The bill is currently being redrafted and its date of implementation is currently uncertain.

Excluded entities and excluded assets

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

Luxembourg ordinary bankruptcy rules apply exclusively to commercial persons, namely persons that carry out acts of commerce and commercial companies that have their central administration and their registered office in Luxembourg. Public entities and private individuals, credit institutions, insurance and reinsurance companies and pension funds, establishments managing funds for third parties, investment funds, investment companies in risk capital (SICAR) and securitisation entities are subject to specific insolvency regimes.

Assets held by states, public-law entities and diplomatic persons, when their activities are related to the exercise of public functions, are excluded from the estate of a bankrupt debtor.

Public enterprises

3 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

There are no specific rules for government-owned companies.

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'?

No.

Courts and appeals

5 What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The commercial has jurisdiction for the opening of the insolvency proceedings. It appoints a delegated judge, which has jurisdiction in respect of any matters that may arise during the proceedings.

The bankrupt company or any person that has been party to the bankruptcy adjudication may appeal the judgment within 15 as of its service or as of the publication of the judgment in the newspaper. In an appeal procedure, the factual elements of the bankruptcy are assessed 'in concreto' on the date of the judgment. Appeals against judgments of the delegated judge are filed before the commercial court. There are no additional requirements for filing an appeal (obtaining permission, post-security), but there is no stay in the enforcement of judgments after the appeal is filed.

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

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

There are no Luxembourg rules for voluntary liquidations of insolvent companies.

Voluntary reorganisations

7 What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

For companies that face financial difficulties, but are not bankrupt, three main procedures, which are rarely used in practice, are available: suspension of payments, controlled management and composition with creditors.

The suspension of payments can be requested by debtors which are in cessation of payments as a result of extraordinary and unforeseeable events and which have sufficient assets to repay all of their creditors or which have credible prospects of recovery. The consent of creditors representing (in numbers) more than 50 per cent and (in value) more than 75 per cent of the debtor's debts must be obtained and the measure must be also approved by the court. If successful, the

procedure will result in a stay of payment requests and enforcement proceedings from all creditors, unsecured or secured (with the exception of security governed by the Law on financial collateral arrangements of 5 August 2005, as amended or in respect of assets which are necessary for the continuation of the debtor's activity), during the period decided by the court.

The controlled management allows a company to either reorganise and restructure its debts and business or liquidate its assets in the best interest of creditors. Controlled management proceedings rarely succeed and generally end in bankruptcy. The company must file an application before the commercial court when it is acting in good faith and either (1) suffers from a loss of creditworthiness or (2) faces difficulties in meeting all of its commitments and its creditors wish to proceed with enforcement procedures. The controlled management requires the consent of more than 50 per cent of the creditors (in number) representing more than 50 per cent in value of the debtor's debts. The court shall appoint a delegated judge to report on the business situation of the debtor. If, on the basis of this report, the application is accepted by the court, it appoints one or more commissioners who will take control of the management of the company and prepare a reorganisation or liquidation plan. The company can regain control over its business if the plan is approved by the creditors. If the court deems that the conditions for the controlled management are not met, it declares the company bankrupt.

The pre-bankruptcy composition with creditors can be accepted by courts only in respect of debtors that are considered to be unfortunate and in good faith and requires the consent of at least 50 per cent of the creditors, holding at least 75 per cent of the debtor's outstanding debts. Any measures agreed between creditors, if ratified by the court, will apply to all unsecured creditors.

Successful reorganisations

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

All three reorganisation measures apply only to existing claims and thus do not apply to subsequent creditors, which remain free to enforce their claims. None of the proceedings results in a debt forgiveness imposed by court to creditors, but only in temporary stays. The stay on enforcement resulting from a suspension of payments and the composition with creditors does not discharge guarantors.

The controlled management entails a stay on creditors' rights, privileges or pledges (except for security under the Law on financial collateral arrangements of 5 August 2005, as amended), which also applies to guarantors.

Involuntary liquidations

9 | What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

At the end of the bankruptcy proceedings, the debtor is liquidated. Judicial liquidation can be decided by courts upon request of the public prosecutor in case of serious breaches of rules applicable to commercial companies or contravention of criminal laws.

Involuntary reorganisations

10 | What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

There are no involuntary reorganisation procedures.

Expedited reorganisations

11 | Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

No.

Unsuccessful reorganisations

12 | 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?

Any reorganisation measure can be revoked by the court at any time if the requirements set out in the judgment having granted it are not complied with by the debtor or if the company has become bankrupt. The suspension of payments may be revoked in case the debtor acts fraudulently or in bad faith or if its financial situation no longer offers any prospects of full repayment of all creditors. The composition with creditors is revoked if the debtor is declared liable of an insolvency related offence or has fraudulently hidden the extent of its assets or liabilities, or both.

In most cases, the revocation is likely to lead to the immediate opening of a bankruptcy proceeding and the bankruptcy date can be retroactively set at the date when the court approved the reorganisation measures.

Corporate procedures

13 | Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Voluntary (solvent) corporate dissolution and liquidation procedures only require the consent of the shareholders and bondholders (if any) and are made-out of court. Creditors' consent may be required under an existing contractual arrangement.

Conclusion of case

14 | How are liquidation and reorganisation cases formally concluded?

Reorganisation proceedings end at their term or by the opening of bankruptcy proceedings.

Bankruptcy proceedings end upon the commercial court's decision.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

15 | What is the test to determine if a debtor is insolvent?

Under article 437 of the Luxembourg Code of Commerce, a commercial entity is bankrupt when:

- it has ceased its payments; and
- its credit is exhausted (loss of creditworthiness, ie the company is unable to obtain credit from third parties or affiliated undertakings).

Both conditions must be met on the day of the bankruptcy adjudication by the commercial court.

Mandatory filing

16 | Must companies commence insolvency proceedings in particular circumstances?

The directors of a bankrupt commercial company must file for bankruptcy within one month from the cessation of payments.

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

17 | If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Failure to file for bankruptcy may constitute the criminal offence of simple bankruptcy. The sanctions for this offence range between one month and two years of imprisonment. Furthermore, the directors may be prohibited from exercising certain commercial activities or rights (such as the right to vote in public elections).

Directors may be also be held liable in tort towards the company and any third parties for any loss resulting from the failure to file for bankruptcy.

Directors' liability – other sources of liability

18 | Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

According to article 495 of the Luxembourg Code of Commerce, a company's bankruptcy may be extended to any legal or *de facto* director who:

- acting under the corporate veil, has entered into commercial transactions for his or her own account or benefit;
- disposed of the company's assets as if they were his or her own; or
- pursued a loss-making business activity which was predestined to lead to bankruptcy, in his or her own interest and in an abusive manner.

According to article 495 1 of the Luxembourg Code of Commerce, the legal and *de facto* directors of a bankrupt company may be held personally liable for the company's outstanding debts, in whole or in part and, jointly or severally, if the bankruptcy results from serious and blatant faults for which they are accountable. Such claims may only be brought by the bankruptcy receiver within three years following the court's judgment establishing all the outstanding receivables.

Under certain situations directors may be held criminally liable of simple bankruptcy or fraudulent bankruptcy. Simple bankruptcy (articles 573 to 576 of the Luxembourg Code of Commerce) applies to, among other things, directors which have made payments only to certain creditors after the cessation of payments or which, in their effort to delay bankruptcy, have entered into transactions at conditions ruinous for the company. This sanction also applies if the directors did not maintain all books required by law or if they did not comply with the court's orders.

Fraudulent bankruptcy (articles 577 to 578 of the Luxembourg Code of Commerce) is applicable to directors which have deliberately dissimulated assets of the company or have used them for personal benefit or have deliberately altered the company's books or if they have consented to recognition of inexistent debts.

Directors are liable towards the company for any wrongdoing or negligence in the management of the company. They are furthermore liable towards third parties as well as towards the company for any losses suffered as a result of a violation of the company's articles or company law. Directors may also be criminally liable for any misuse of company's assets or the use of powers in the company for their own benefit.

Directors' liability – defences

19 | What defences are available to directors and officers in the context of an insolvency or reorganisation?

Most of the cases of liability for directors are based on intentional breaches of their duties and the defences are limited to providing evidence that the requirements are not met. Directors' civil liability insurance covers liability to the company and third parties arising from a management error, a violation of the Law of 10 August 1915 on commercial companies, as amended, or the company's articles of association, or in tort. It is not possible to insure directors against administrative or criminal penalties. A director may not be exonerated from injury caused intentionally or resulting from gross negligence.

Shift in directors' duties

20 | Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

There is no concept of a duty of the directors towards third parties. Upon the opening of the bankruptcy proceedings, the management of the company is entrusted to a bankruptcy receiver, which replaces the directors as the management body and whose primary mission is to liquidate the company's assets for the purpose of obtaining the maximum possible return for the company. The creditors' interests are taken into account only indirectly when assessing the existence of any failures in management which have contributed to the bankruptcy.

Directors' powers after proceedings commence

21 | What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After a judgment of bankruptcy, directors lose all management and decision powers, as well as the right to take legal action in the name of a debtor.

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

22 | 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?

All four insolvency proceedings involve a stay on enforcement for unsecured creditors. For the creditors subject to such restrictions the suspension applies until the end of the proceedings.

Doing business

23 | When can the debtor carry on business during a liquidation or reorganisation? 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?

During controlled management and bankruptcy, the debtor is no longer allowed to operate its business. In the case of the suspension of

payments, the debtor is allowed to continue its activity under the supervision of supervisory receivers. The receivers may be designated among the creditors, but once appointed they will be bound to act as officers of the court and not pursue their individual interest. The receiver may also employ the debtor for assistance purposes during bankruptcy proceedings. During a composition with creditors, the debtor continues to manage its activity, but every three months the delegated judge assesses the company's financial situation.

The opening of bankruptcy proceedings does not result in the automatic termination of any existing agreements with suppliers validly, with the exception of intuitu personae agreements and agreements that contain clauses providing for termination in case of bankruptcy. The claims relating to an ongoing agreement that is continued will be privileged and have the same rank as the bankruptcy costs.

Post-filing credit

24 | May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

Sale of assets

25 | 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?

The bankruptcy receiver's mission is to value the assets, which are sold an 'as is, where is' basis. All the assets acquired by third parties are free of any liabilities (unless otherwise agreed with the purchasers).

Negotiating sale of assets

26 | Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The liquidation of the assets as a part of the bankruptcy proceedings is not conducted by the debtor. The creditors of the debtor can acquire assets during the liquidation, however, there cannot be a set-off between the price and their share of the liquidation proceeds. The bankruptcy receiver is allowed, subject to the approval of the delegated judge, to settle claims with creditors.

Rejection and disclaimer of contracts

27 | Can a debtor undergoing a liquidation or 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?

For bankruptcy proceedings, certain agreements and transactions are void by virtue of law or voidable if they have been entered into during the hardening period. The bankruptcy receiver may decide to terminate other agreements if they are on unfavourable terms for the company. In case the early termination is not allowed under the underlying contractual documentation, any indemnities would have to be filed as claims.

Intellectual property assets

28 | May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Termination is possible if expressly provided for or in case of intuitu personae agreements.

Personal data

29 | Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

All companies are subject to the Regulation (EU) 2016/679 (General Data Protection Regulation) and Luxembourg national data protection rules, which will apply in case of use or transfer of data during a reorganisation or liquidation.

Arbitration processes

30 | How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

All Luxembourg insolvency proceedings are carried out before Luxembourg courts. Arbitration clauses included in existing agreements remain valid.

CREDITOR REMEDIES

Creditors' enforcement

31 | 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?

With the exception of controlled management, the opening of the Luxembourg insolvencies leaves unaffected the rights of secured creditors. Luxembourg security governed by the Law on financial collateral arrangements of 5 August 2005, as amended may be enforced out of court.

Unsecured credit

32 | What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors are not allowed to enforce individually their claims against a debtor subject to any insolvency proceedings (except after the closure of the liquidation). They may however file their claim against the bankruptcy estate and vote on or challenge certain decisions of the court, the delegated judge and the bankruptcy receiver which affect their rights. Ongoing court proceedings may be continued, provided that the bankruptcy receiver intervenes therein, but any new proceedings are prohibited.

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

33 During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they 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 the liquidator's reporting obligations?

Under controlled management, once the proposed plan is established, the plan must be communicated to the general body of creditors and to the known joint and several co-debtors and guarantors. The plan will be also lodged with the Luxembourg Business Register.

For the pre-bankruptcy arrangement with creditors, if, after its preliminary review, the court decides that the proceedings may continue, it will convene all known unsecured creditors and ask them to vote on the arrangement.

The judgment ordering the opening of bankruptcy proceedings is published by the bankruptcy administrator in two newspapers. Information about the bankruptcy is also published with the Luxembourg Business Register. If the bankruptcy receiver identifies assets that may be allocated to the creditors, it will convene them and ask to take position on the intended distribution of proceeds.

During the liquidation process, the court may decide to convene the creditors at any moment. At the end of the process, all creditors will be convened by the delegated judge. The creditors must approve the liquidation accounts and may object by appealing before the bankruptcy court.

Creditor representation

34 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?

The creditors do not have an active role in insolvency proceedings and are only required to consent to or approve certain measures (such as a reorganisation plan in controlled management, suspension of payments, pre-bankruptcy arrangement with creditors). In such cases, all creditors are then convened into assemblies. All costs and expenses of the creditors in relation to the exercise of their rights during the proceedings are borne by themselves. In respect of bankruptcy, the law dated 30 June 1930 provides that the delegated judge may establish an advisory unsecured creditors' committee (rarely used) whose mission is to assist the bankruptcy receiver and supervise the bankruptcy proceedings.

Enforcement of estate's rights

35 If the liquidator 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? Can they be assigned to a third party?

Only the bankruptcy receiver can act in the name of the estate and receive the proceeds of the liquidation on its behalf. It can however enter into settlements regarding any of the assets or rights of the estate or outright sell them. Article 535 of the Luxembourg Code of Commerce provides expressly that the debtor cannot be a transferee.

Claims

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

In bankruptcy proceedings, the creditors must file their claims with the clerk of the court within the time period set out in the judgment declaring the opening of the proceedings. Late filing creditors are not foreclosed but are excluded from any distributions already decided.

All claims that may give rise to payments of money must be filed, regardless of their status (principal and interest, contingent and disputed claims, claims for damages for breach of contract and nullity, etc). After the date of the bankruptcy judgment, no additional interest for existing debts may accrue, except for secured debts.

The court may delay the verification of claims subject to ongoing court proceedings while their amount is determined.

All filed claims are subject to the process of verification of claims, which consists in an assessment of their existence and their amount. If a claim is not justified, the bankruptcy receiver will reject it and notify the creditor. The creditors may challenge this by filing proceedings within 40 days before the bankruptcy court.

Set-off and netting

37 To what extent may creditors 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?

Legal set-off (ie, between mutual debts that are liquid, due and payable), as provided for by article 1289 et seq. of the Luxembourg Civil Code, remains possible both in the case of controlled management and bankruptcy. Post-bankruptcy contractual set-off or close-out netting are not permitted except if they constitute financial collateral arrangements under the Law on financial collateral arrangements of 5 August 2005, as amended.

Modifying creditors' rights

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

No.

Priority claims

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

Debts arising after the opening of a controlled management or a bankruptcy proceeding are super-preferred and are paid before any other debts. Such claims include costs and expenses incurred by the bankruptcy receiver, insurance premium paid in respect of policies entered into after the opening of the bankruptcy proceedings and rent becoming due during the same period.

Regarding debts arising prior to the opening of bankruptcy proceedings, there is a wide variety of statutorily preferred claims which are governed by complex priority rules. Such preferred claims include:

- preferred claims over all the debtor's assets, which include the rights of employees, social security claims, tax authorities claims and bankruptcy proceedings fees;

- specific preferred claims over movable property, such as the claims of a creditor having the benefit of a pledge and expenses incurred for the preservation of an asset; and
- specific preferred claims over immovable property, such as the claims of the seller for the payment of the price of a property, claims of the lenders who financed the acquisition of a property, claims of the heirs on their respective part of the real property.

The enforcement of validly granted security interests, as well as reservation of titles clauses are not affected by the insolvency proceedings. In a situation where the security is not yet enforceable, the bankruptcy receiver would sell the relevant assets and allocate the proceeds to the secured creditors. If the proceeds of the security do not extinguish all secured obligations, the remaining claims will have to be filed in the bankruptcy and will be treated pari passu with the unsecured claims.

Employment-related liabilities

40 What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Employment contracts are automatically terminated upon a declaration of bankruptcy as provided under article L-125-1 of the Employment Code. According to case law, the insolvency administrator must follow the ordinary process of termination of employment agreements and specific provisions of collective redundancy where applicable.

The State Employment Fund will guarantee the wage claims and compensations due to employees at the date of the judgment declaring the bankruptcy that relate to the last six months of work and the termination of their employment contract. According to article 545 of the Luxembourg Code of Commerce, these claims and indemnities will be listed as privileged claims with the same rank and in the same conditions as other privilege claims.

Pension claims

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

The complementary pension regime is ruled by a law dated 8 June 1999 as amended, which provides for mandatory insurance covering insolvability risks and applies to controlled management proceedings and bankruptcy proceedings. 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, namely, no indemnification of the pension fund or group insurance for the non-payment of contributions.

Environmental problems and liabilities

42 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 personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Upon the opening of bankruptcy of an entity subject to environmental obligations, the bankruptcy receiver will notify the environmental administration. If a fault of directors in the application of the environmental laws could be proven, the receiver may also engage pursuits against them.

Liabilities that survive insolvency or reorganisation proceedings

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

After the closing of bankruptcy proceedings, no further claim shall be admissible by any creditor against the debtor, unless the debtor returns to a better financial situation within seven years, or the debtor was convicted for simple or fraudulent bankruptcy.

Distributions

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

The net proceeds of the liquidation are distributed on a pro rata basis to all ordinary unsecured creditors.

SECURITY

Secured lending and credit (immovables)

45 What principal types of security are taken on immovable (real) property?

Immovable property can be made subject to a mortgage, which requires the registration with the public registrar and the payment of registration duties.

Secured lending and credit (movables)

46 What principal types of security are taken on movable (personal) property?

The most common security over moveable assets is the pledge submitted to Law on financial collateral arrangements of 5 August 2005, as amended. This law allows the granting of flexible, low-formality and insolvency remote security interests in respect of shares, all types of claims and receivables and financial instruments without physical dispossession of assets and with swift, out-of-court enforcement options. Older forms of security interests, such as the commercial pledge provided under the Code of Commerce and the pledge from the Civil Code, are very rarely used since the adoption of the 2005 law. Pledges over businesses may also be granted in respect of goodwill, but only to certain creditors.

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

47 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Article 445 of the Luxembourg Code of Commerce provides that the following transactions and acts made during the hardening period of six months and within the 10 preceding days are null and void:

- agreements relating to the transfer of movable or immovable property lacking consideration and agreements and transactions with insufficient consideration for the debtor;
- payments, whether in cash or by transfer, assignment, sale, set-off or otherwise for debts not yet due, and payments other than in cash or bills of exchange for debts due; and
- security granted for pre-existing debts.

Pursuant to article 446 of the Luxembourg Code of Commerce, all payments of pre-existing debts and transactions for consideration entered into during the hardening period may be annulled by the court

if the counterparty to the transaction was aware of the state of cessation of payments.

Article 447 of the Luxembourg Code of Commerce provides that rights of mortgage and preference that have been validly acquired can be registered until the date of the opening judgment. However, registration made within the hardening period may be annulled if more than 15 days have elapsed between the date of granting of the mortgage or privilege and the date of registration.

According to article 448 of the Luxembourg Code of Commerce, all acts and payments entered into with the intention to deprive the other creditors of the bankrupt company of their rights may be declared null and void regardless of their date.

Equitable subordination

48 | Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

There is no concept of equitable subordination under Luxembourg law. The shareholders of the company would be entitled to recover any valid claims they may have against the company as any other creditor and receive their share from the liquidation proceeds (if any).

GROUPS OF COMPANIES

Groups of companies

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

General partners of Luxembourg partnerships, as well as unlimited partners of other unlimited liability Luxembourg companies are jointly liable for any debts of the company. The maximum extent of the liability of shareholders of limited liability companies is in principle the value of their shares. Exceptionally, they might be held liable for the liabilities of their subsidiary, if they have acted as *de facto* directors.

Combining parent and subsidiary proceedings

50 | In 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?

Insolvency of a group is not formally recognised. However, Luxembourg courts and receivers may take into account proceedings initiated against members of the same group.

INTERNATIONAL CASES

Recognition of foreign judgments

51 | 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?

Based on the provisions of the EU Insolvency Regulation 2015/848, foreign main insolvency proceedings opened in a member state of the European Union will be recognised immediately in Luxembourg.

Outside of the framework of the EU Insolvency Regulation 2015/848, Luxembourg law applies the principles of unity and universality of bankruptcies. Foreign judgments that purport to have international effects may be recognised if they are valid in their jurisdiction. An enforcement order (*exequatur*) will be required for the enforcement of foreign judgments.

UNCITRAL Model Law

52 | Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

No.

Foreign creditors

53 | How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are treated equally to local creditors in insolvency proceedings opened. When filing claims in the bankruptcy proceedings, foreign creditors domiciled abroad must elect domicile in the jurisdiction of the court. The bankruptcy judge may also grant additional time for the filing of claims to creditors residing outside Luxembourg.

Cross-border transfers of assets under administration

54 | May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There is no legal framework providing for this type of transfer, but bankruptcy receivers may enter into arrangements with foreign receivers for the purpose of liquidating the assets of a Luxembourg debtor.

COMI

55 | 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?

When the EU Insolvency Regulation 2015/848 applies, the concept of centre of main interests (COMI) is used in priority to the local concepts. Luxembourg courts (Tribunal d'Arrondissement de Luxembourg, 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*

In all situations where the COMI concept is not applicable, Luxembourg courts will try to identify the effective seat, which is only presumed to be at a registered seat. The concept of a place of central administration, which is the place from where the company is actually managed, is used for determining the nationality of companies and their effective seat. Luxembourg courts (Tribunal d'Arrondissement (com) de Luxembourg, 14 November 1997, No. 47753) have asserted their jurisdiction over a foreign company that had in Luxembourg only a branch since its main centre of activities was in Luxembourg.

Cross-border cooperation

56 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?

The EU Insolvency Regulation 2015/848 provides that foreign main insolvency proceedings opened in a member state of the European Union will be recognised immediately in other member states, in accordance with the terms thereof.

With regards to other foreign judgments, Luxembourg applies the principles of unity and universality. Foreign judgments are recognised if, in their jurisdiction, are valid and have international effects. There is no condition of reciprocity. However, an enforcement order (*exequatur*) is required in case of enforcement.

There is no specific framework for cooperation with foreign insolvency officers. Cross-border cooperation has been accepted on a case by case basis in certain high-profile insolvency cases. These arrangements are based on the principle of jurisdictional cooperation and require a court approval in Luxembourg and evidence that they are in the interest of the Luxembourg debtor.

Cross-border insolvency protocols and joint court hearings

57 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?

There are no comprehensive cooperation agreements in the field of insolvency with third countries, namely, countries where EU Insolvency Regulation 2015/848 does not apply.

Winding-up of foreign companies

58 What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

Entities that fall outside the territorial jurisdiction of Luxembourg courts are excluded from insolvency proceedings. Secondary proceedings under the EU Insolvency Regulation 2015/848 may be opened.

UPDATE AND TRENDS

Trends and reforms

59 Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Insolvency proceedings other than bankruptcy are rarely used in Luxembourg because of their length, costs and lack of flexibility. They are mostly governed by outdated provisions and do not offer adequate protections to companies.

This draft bill 6539 aims to achieve a comprehensive reform and includes several preventive, repressive, restorative and social provisions which aim to reduce, or at least stabilise, the recent increase of bankruptcies and significantly improve the restructuring options for debtors. The draft bill, which should also implement the EU Directive on restructuring and insolvency of 20 June 2019, was criticized by the various stakeholders and is currently being redrafted.

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Constantin Iscru
constantin.iscru@dlapiper.com

Xavier Guzman
xavier.guzman@dlapiper.com

37A, Avenue John F Kennedy
L-1855
Luxembourg
Tel: +352 26 29 04 1
Fax: +352 26 29 04 3000
www.dlapiper.com