

Restructuring and Insolvency Jurisdiction Guide: Luxembourg

Insights - 02/08/2021

| Domestic Procedures

What are the principal insolvency procedures for Companies in your jurisdiction?

- Bankruptcy (faillite)
- Controlled management (gestion contrôlée)
- Composition to avoid insolvency (concordat préventif de faillite)
- Reprieve from payment procedure (sursis de paiement)

Draft legislation was introduced in the Luxembourg Parliament in February 2013 aiming at favouring

modernising,
reorganisations and
insolvencies.

**Reprieve from
payment
procedure (sursis
de paiement)**

- It allows a business experiencing financial difficulties to suspend its payments for a limited period of time in order to restructure its debt
- It has to be approved by creditors representing 75% of all the outstanding amounts

**Composition to
avoid insolvency
(concordat
préventif de
faillite)**

- Agreement between a company experiencing financial difficulties and its creditors under the control and with

Are any of the procedures available on a provisional basis?

the approval of the court in order to avoid insolvency

- Proposal must have the support of a majority of the creditors representing 75% of the outstanding amount

For practical reasons, these two procedures are rarely used and will not be discussed further in this paper.

Bankruptcy (faillite)

- A company is considered bankrupt when (a) it is unable to pay its debts as they fall due, which characterises a state of cessation of payments (cessation de paiements), and (b) has lost its creditworthiness

(ébranlement de
crédit). These

What requirements must be satisfied for the procedures to be pursued?

creation. These are cumulative conditions: a balance sheet test is not sufficient under Luxembourg law to ascertain whether a company is legally in a bankruptcy situation

Controlled management (gestion contrôlée)

- The purpose is to assist the company which has difficulties in meeting all of its commitments when due to reorganise its business or to convert its assets into cash under the supervision of the court and with the approval of the creditors

Bankruptcy (faillite)

- It can be initiated either by the company

itself, by the court of the district where its registered office is located, or by a creditor of the company

- A receiver (curateur) in charge of the liquidation and a judge (juge commissaire) to supervise the proceedings are appointed by the court
- There is no specific time limits for a bankruptcy proceeding. The length of the procedure depends on the complexity of the bankruptcy. It typically lasts 2 to 4 years

What is the procedure and how long does it typically take?

Controlled management (gestion contrôlée)

- Application is filed by the debtor to the commercial court
- If accepted, a

	<p>judge is assigned to prepare a report on the financial situation of the company</p> <ul style="list-style-type: none"> • The plan must be approved by more than 50% in number of the creditors, representing more than 50% in value of the debtor's liabilities • The length of the procedure varies depending on the specific timeframe for the suspension set by the court
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Can any procedures be pursued without the involvement of the Court?

While out-of-court restructurings can be achieved on a contractual basis, all the above listed insolvency procedures are judicial procedures.

	<p>Bankruptcy (faillite)</p> <ul style="list-style-type: none"> • The receiver administers the winding-up
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What is the effect upon control of the company and its assets during those procedures?

the winding up
of the insolvent
company under
the supervision
of the judge-
commissioner

**Controlled
management
(gestion
contrôlée)**

- The company retains the power to manage its assets but is no longer allowed to act without the authorisation of the judge-commissioner

**Bankruptcy
(faillite)**

- The insolvency judgement has the effect of stopping all attachment or garnishment proceedings brought by creditors (except for those benefiting from a security interests governed by the law of 5 August 2005 on

Is there an automatic moratorium and if so when does it come into effect and what is its effect?

financial
collateral
arrangements
[the Financial
Collateral
Law]), although
creditors may
still commence
or continue
court
proceedings
against it

**Controlled
management
(gestion
contrôlée)**

- Both secured
(except for
security
interests
governed by the
Financial
Collateral Law)
and unsecured
creditors are
prevented from
enforcing claims
or court
decisions
against the
debtor, although
creditors may
still commence
or continue
court
proceedings
against it

Compulsory
liquidation can be

Can companies be forcibly wound up other than when insolvent?

ordered by the court if a Luxembourg commercial company (i) either has pursued illegal activities, or has seriously infringed the provisions either of the Luxembourg commercial code or the provisions of the Luxembourg law on commercial companies or (ii) upon the request of a shareholder, or a group of shareholders, if it is established that such shareholder has a solid ground for this request. This is typically the case when a conflict between shareholders creates a permanent paralysis of the corporate bodies of the company.

Bankruptcy (faillite)

- Main purpose is to realise the assets of the debtor and to distribute the proceeds to the

To what extent are the procedures designed to facilitate a rescue of a company's business?

creditors

- Controlled management (gestion contrôlée)
- Aims at assisting a company in financial difficulties in reorganising its business or converting its assets into cash

Can the procedures be used to facilitate the sale of all or part of the insolvent company's business?

Yes, the receiver can, with the authorisation of the court, sell all or part of the company's business, either by public auction or private contract. While "prepack" sale is not available in Luxembourg, in certain circumstances (depending on the facts and the structure), a similar result can be achieved through the enforcement (by way of private sale or out-of-court appropriation) of a Luxembourg law pledge

Cross Border

Recognition of foreign insolvency proceedings

- A formal recognition (exequatur) is required in order to give effect to the enforcement measures contained in a foreign judgment in relation to assets located in Luxembourg EU cross-border insolvency proceedings

To what extent do the courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?

- The powers of an insolvency office holder appointed by the courts of the jurisdiction

where the debtor has its centre of main interests are

recognised
as part of
main
proceedings
without any
further
formalities

Are there any limitations typically imposed in respect of the recognition of an overseas appointee?

As a general principle foreign insolvency proceedings regularly opened in another state, which is not in the EU, are recognised directly without any specific formalities except to the extent such recognition would require local enforcement measures, in which case formal recognition (exequatur) needs to be sought from the Luxembourg courts.

What kinds of overseas appointees have been recognised in your jurisdiction?

See above.

Luxembourg

Do the courts in your jurisdiction assist in applications to subject a company incorporated in your jurisdiction becoming subject to an insolvency procedure in another jurisdiction?

courts would not assist in such applications.

Creditors

What are the principle forms of security taken in your jurisdiction in respect of movable and immovable property?

Immovable property

- Mortgage over real estate (hypothèque)

Movable property

- Pledge (gage) of moveable assets
- Pledge (gage) and transfers of ownership as a security (transfert de propriété à titre de garantie) granted on financial instruments (eg. shares) and claims (eg. bank accounts, receivables) governed by the Financial Collateral

- Pledges over a going concern (gage sur fonds de commerce)

Bankruptcy (faillite)

- An insolvency judgement has the effect of stopping all attachment or garnishment proceedings. However, the stay of enforcement does not apply to Luxembourg law security interests (like pledges) governed by the Financial Collateral Law

Controlled management (gestion contrôlée)

- Secured (except for

What is the effect on secured creditors of the commencement of an insolvency procedure?

security
interests
governed by
the Financial
Collateral
Law) and
unsecured
creditors may
not enforce
against the
debtor

- Insolvency receiver
- Super-privileged employees (last 6 months' wages with a maximum of six times the minimal social salary)
- Employees' contribution to social security (from salary)
- Taxes
- Employer's contribution to social security
- Lessor and pledgor and special secured

Which creditors are preferred and to what extent?

debts

- Unsecured debts

What is the position regarding the recoverability and quantum of liquidator's fees and expenses of the insolvency procedure?

Insolvency receivers are entitled to a fee for their service corresponding to a certain percentage of the assets realised and dividends paid to the creditors. If the assets of the company are not sufficient to cover these fees, the Luxembourg State will bear them and the receiver will receive a fixed fee.

Avoidance Transactions

Following contracts are automatically null and void if concluded during the suspect period" (période suspecte) (ie. less than 6

months and 10 days before the judgment opening the insolvency proceeding):

- Transaction at an undervalue
- Payment made in respect of debts that are not yet due
- In-kind payment made in respect of debts that are due
- Security granted to secure obligations incurred before the security contract was entered into

What if any categories of transaction can be avoided/set aside?

The insolvency receiver. Additionally, notwithstanding the time when they were made (including prior to the suspect

Who is responsible for seeking orders to set aside such transactions?

to the suspect period), any contracts or payments can be annulled by the insolvency court if they were made in fraud of the creditors' rights.

Contributions to the liquidation estate and liability of officers

Extension of a company's bankruptcy to a manager

- Bankruptcy can be extended to any legal or de facto director who either:

- (i) While acting under the corporate veil, has entered into commercial transactions for their own account or benefit
- (ii) Disposed of the company's

Can directors or shareholders be required to contribute to the liquidation estate?

assets as if they were their own or
(iii) Pursued a loss-making business activity in their own interest and in an abusive manner

Debt contribution action

- Legal and de facto managers of a bankrupt company can 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 obvious faults (fautes graves et caractérisées) for which they are accountable

Criminal liability: negligent bankruptcy (banqueroute

What liability can directors or other officers attract in respect of an insolvent company?

simple)

- “Simple”
bankruptcy
convictions are,
for example,
failing to declare
the company
bankrupt in
accordance with
the legal
provisions or not
keeping regular
accounting
records

**Criminal liability:
fraudulent
bankruptcy
(banqueroute
frauduleuse)**

- Fraudulent
bankruptcy
convictions are,
for example,
fraudulently
embezzled or
diverted part of
the company’s
assets or partly
or entirely
removed the
books or

accounting
documents, or
fraudulently
removed, deleted
or altered their
contents

Directors who have
committed serious

In what circumstances can directors be disqualified as a consequence of a company being wound up?

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offences or breaches of duty which have contributed to a company's bankruptcy can be prohibited from carrying out any commercial activities or being appointed as a director, manager, statutory auditor, approved external auditor or any similar position which includes the power to represent a company, for a period ranging from 1 to 20 years.

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