Restructuring and Insolvency Jurisdiction Guide: Luxembourg

Insights - 20/05/2024

Domestic Procedures

Question	Answer
What are the principal insolvency procedures for Companies in your jurisdiction?	• Bankruptcy *(faillite)* Following the entry into force on 1 November 2023 of the law of 7 August 2023 on business preservation and modernisation of bankruptcy: • Judicial reorganisation (*réorganisation judiciaire*) • Out-of-court reorganisation (*réorganisation par accord amiable*) • Laws and regulations pertaining to controlled management (*gestion contrôlée*) and composition to avoid insolvency (*concordat préventif de faillite*) were repealed. These two procedures were rarely used and will not be discussed further in this paper.

Moratorium applicable in the context of out-of-court reorganisation (*réorganisation par accord amiable*)

- The reorganisation is proposed by a distressed debtor to two or more of its creditors. It aims at the reorganisation of the debtor's assets and activities pursuant the terms of a negotiated out-of-court agreement
- The debtor can request the court to open judicial reorganisation proceedings with a view to benefit from a moratorium in view of the conclusion of the out-of-court agreement
- In such case, the debtor will benefit from a moratorium set by the court which cannot be longer than 4 months, unless extended upon request and for a duration which cannot exceed 12 months in total

Are any of the procedures available on a provisional basis?

- As a result of the moratorium, (i) no enforcement action may be taken against movable or immovable property during the suspension period, but with respect to the unsecured claims (*créances sursitaires*) only, (ii) all attachment or garnishment proceedings brought by unsecured creditors (*créanciers sursitaires*) stop, (iii) the debtor can suspend the performance of its obligations

	under existing agreements, except for employment contracts and (iv) penalty clauses are unenforceable during the moratorium .and until the reorganisation plan has been fully implemented • Security interests governed by the law of 5 August 2005 on financial collateral arrangements [the Financial Collateral Law] remain enforceable Please see below for more information on out-of-court reorganisation (*réorganisation par accord amiable),* judicial reorganisation (*réorganisation judiciaire)* and applicable moratorium
What	**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 are cumulative conditions: a balance sheet test is not sufficient under Luxembourg law to ascertain whether a company is legally in a bankruptcy situation **Judicial reorganisation**

requirements must be satisfied for the procedures to be pursued?	**(*réorganisation judiciaire*)** • The purpose is to preserve, under the control of the judge, the continuity of all or part of the assets and activities of the debtor. The debtor must establish that the continuity of its business is threatened at term • The procedure can be opened for one of the following aims: (i) obtaining the agreement of the creditors to a reorganisation plan or (ii) the sale by way of judicial decision of the debtor's assets and activities to one or more third parties Any further development on judicial reorganisation will be limited to the adoption of the reorganisation plan
	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

Judicial reorganisation (*réorganisation judiciaire*)

- The debtor initiate the judicial reorganisation by way of an application to the court. As part of the application, the debtor must provide amongst others a statement of the facts showing that the continuity of its business is threatened at term, indicate the aim(s) for which the opening of the judicial reorganisation is requested, and provide a statement of measures and proposals to restore the profitability and solvency of the business, implement a possible social plan and satisfy its creditors
- The fact that the debtor may meet the criteria for bankruptcy does not preclude the opening and continuation of the judicial reorganisation
- The debtor prepares a reorganisation plan. It may be assisted by a judicial representative (*mandataire judiciaire*), who may be appointed by the court upon request of the debtor or a third party with a vested interest
- As a general rule, the reorganisation plan must be approved by a majority of the creditors within each class of

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

	unsecured creditors (*créanciers sursitaires*) and secured creditors (*créanciers sursitaires extraordinaires*), representing at least half of the claims within each class • A cross-class cram down mechanism has been introduced in Luxembourg law allowing to secure a reorganisation plan that will bind dissenting creditor classes under specific circumstances. • Once homologated by the court, the reorganisation plan becomes enforceable against all unsecured creditors (*créanciers sursitaires*) • The length of the procedure varies depending on the specific timeframe for the moratorium set by the court, which cannot be longer than 4 months, unless extended upon request and for a duration which cannot exceed 12 months in total. The court can close the reorganisation proceedings when it becomes manifest that the debtor is no longer able to ensure the continuity of all or part of its business or assets
	Out-of-court reorganisation (*réorganisation par accord amiable*) • The reorganisation is proposed by a distressed debtor to two or more of its creditors

	of more of its creditors • It aims at the reorganisation of the debtor's assets and activities pursuant the terms of a negotiated out-of-court agreement • The debtor can request the court to open judicial reorganisation proceedings with a view to benefit from a moratorium in view of the conclusion of the out-of-court agreement • The out-of-court agreement can be homologated by the Luxembourg courts, giving it enforceability • The out-of-court agreement is confidential
Can any procedures be pursued without the involvement of the Court?	• In case of subsequent bankruptcy, avoidance rules generally applicable to bankruptcy will not apply to homologated out-of-court agreements and other actions taken for the performance thereof, except for (i) transactions at an undervalue and (ii) security granted to secure obligations incurred before the security contract was entered into (see the Avoidance Transactions section for more information) • Creditors party to the out-of-court agreement will not be liable towards the debtor, other creditors or third parties in the case the out-of-court

	agreement did not succeed in preserving the continuity of part or all of the debtor's business • If the debtor so requests, a conciliation officer (*conciliateur d'entreprise*) may be appointed in order to assist with the preparation, negotiation and performance of the out-of-court agreement
What is the effect upon control of the company and its assets during those procedures?	**Bankruptcy *(faillite)*** • The receiver (*curateur*) administrates the winding-up of the insolvent company under the supervision of the judge-commissioner (*juge commissaire*) **Judicial reorganisation (*réorganisation judiciaire*)** • The debtor remains in control of its assets and the day-to-day operation of its business
	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 Financial Collateral Law), although creditors may still commence or continue court proceedings against it **Judicial reorganisation**

Is there an automatic moratorium and if so when does it come into effect and what is its effect?	**(*réorganisation judiciaire*)** • Upon application to the court for the opening of the judicial reorganisation: no realisation of movable and immovable property may take place after having obtained enforcement • Upon adjudication by the court of the judicial reorganisation: the debtor benefit from a moratorium set by the court, which cannot be longer than 4 months, unless extended upon request and for a duration which cannot exceed 12 months in total • As a result of the moratorium, (i) no enforcement action may be taken against movable or immovable property during the suspension period, but with respect to the unsecured claims (*créances sursitaires*) only, (ii) all attachment or garnishment proceedings brought by unsecured creditors (*créanciers sursitaires*) stop, (iii) the debtor can suspend the performance of its obligations under existing agreements, except for employment contracts and (iv) penalty clauses are unenforceable during the moratorium and until the reorganisation plan has been fully implemented • Security interests governed by the Financial Collateral Law remain enforceable

Can companies be forcibly wound up other than when insolvent?	• Compulsory liquidation can be 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 • The public prosecutor can request the manager of the Luxembourg Trade and Companies Register to proceed with the administrative dissolution without liquidation (*dissolution administrative sans liquidation*) of a commercial company which has no employee, no assets and 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
	Bankruptcy (*faillite*)

To what extent are the procedures designed to facilitate a rescue of a company's business?	**Bankruptcy *(faillite)*** • Main purpose is to realise the assets of the debtor and to distribute the proceeds to the creditors • Aims at assisting a company in financial difficulties in reorganising its business or converting its assets into cash, but the survival of the company is not the main objective • The company is automatically dissolved upon the closing of the bankruptcy proceedings **Judicial reorganisation (*réorganisation judiciaire*)** • Main purpose is to preserve, under the control of the judge, the continuity of all or part of the assets and activities of the debtor.
Can the procedures be used to facilitate the sale of all or part of the insolvent company's	**Bankruptcy *(faillite)*** • 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.

business?	**Judicial reorganisation (*réorganisation judiciaire*)** • Yes, one of the possible aims of the judicial reorganisation is to proceed with the sale by way of judicial decision of the debtor's assets and activities to one or more third parties

Cross Border

Question	Answer
To what extent do the courts in your jurisdiction lend assistance to overseas appointees (through recognition) and in what circumstances?	**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 • 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 As a general principle, foreign insolvency

Are there any limitations typically imposed in respect of the recognition of an overseas appointee?	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 (exeqatur) needs to be sought from the Luxembourg courts.
What kinds of overseas appointees have been recognised in your jurisdiction?	See above.
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?	Luxembourg courts would not assist in such applications.

Creditors

Question	Answer
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 Law • 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

Judicial reorganisation (*réorganisation judiciaire*)

- Upon application to the court for the opening of the judicial reorganisation: no realisation of movable and immovable property may take place after having obtained enforcement

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

- Upon adjudication by the court of

the judicial reorganisation: the debtor benefit from a moratorium and as a result (i) no enforcement action may be taken against movable or immovable property during the suspension period, but with respect to the unsecured claims (*créances sursitaires*) only, (ii) all attachment or garnishment proceedings brought by unsecured creditors (*créanciers sursitaires*) stop.

- Security interests governed by the Financial Collateral Law remain enforceable

Which creditors are preferred and to what extent?	• 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 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

Question	Answer
What if any categories of transaction can be avoided/set aside?	Following contracts are automatically null and void if concluded during the hardening period (*period suspecte*) (ie. up to 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
Who is responsible for seeking orders to set aside such transactions?	The insolvency receiver. Additionally, notwithstanding the time when they were made (including prior 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

Question	Answer
	Extension of a company's

Can directors or shareholders be required to contribute to the liquidation estate?	**bankruptcy to a manager** • Bankruptcy can be extended to any legal or de facto director who either: 1. While acting under the corporate veil, has entered into commercial transactions for their own account or benefit 2. Disposed of the company's assets as if they were their own or 3. 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 held accountable
What liability	**Criminal liability: negligent bankruptcy *(banqueroute simple)*** • "Simple" bankruptcy convictions are, for example, failing to declare the company bankrupt in accordance with the legal provisions or not keeping

can directors or other officers attract in respect of an insolvent company?	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
In what circumstances can directors be disqualified as a consequence of a company being wound up?	Legal and de facto managers of a bankrupt company who have committed serious 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, independent auditor or any similar position which includes the power to represent a company, for a period ranging from 1 to 20 years. This prohibition is automatically applicable to directors sentenced for negligent bankruptcy or fraudulent bankruptcy.

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