COUNTRY COMPARATIVE GUIDES 2021

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Luxembourg

LENDING & SECURED FINANCE

Contributing firm

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Luxembourg.

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LUXEMBOURG
LENDING & SECURED FINANCE

1. Do foreign lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Lending activities

Subject to the provisions of the Luxembourg financial sector act dated 5 April 1993, as amended, EU-based financial institutions performing lending activities in Luxembourg shall not require a license, based on the EU rules of freedom to provide services, freedom of capital and freedom of movement, which will prevail over any country-specific license requirements in this respect, provided that such activities are covered by the authorizations that the relevant lenders received in their home countries.

Non-EU based financial institutions offering their services in Luxembourg shall be subject to the same authorization rules as those applying to professionals governed by Luxembourg law and shall, therefore, be required to obtain a license from the Luxembourg Ministry of Finance if they engage in regulated financial sector activities such as, in particular, the business of granting loans to the public for their own account. However, based on the current official position of the Luxembourg financial sector authority (*Commission de Surveillance du Secteur Financier*), such license requirement shall only be triggered if certain cumulative conditions are met (notably if agents of the relevant lender are sent to Luxembourg to provide regulated services). Where a lender only provides general information on its activities to potential Luxembourg borrowers (e.g. by email or telephone) or where a Luxembourg borrower approaches the lender in the lenders' home country to enter into a loan, no license shall be required. Preparatory works, road shows or preliminary meetings in Luxembourg leading to the entry into a loan agreement are also excluded from the scope of such license requirement. However, each such situation shall be assessed on a case-by-case basis.

Taking security

There is no requirement for a foreign entity to obtain a license/regulatory approval to take the benefit of security over assets located in Luxembourg, except for specific security interests such as pledges over a going concern/business universality (*gages sur fonds de commerce*) which can only be granted to specifically authorised credit institutions, notaries or breweries.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

There is no Luxembourg law or regulation setting a limit on the amount of interest that can be charged by lenders. Luxembourg courts may, however, reduce any contractually agreed interest rate to be paid by a Luxembourg borrower to the maximum legal interest rate in case the contractual rate is held manifestly excessive by such courts.

In addition, in accordance with article 1154 of the Luxembourg Civil Code, interest stipulated in a Luxembourg law agreement may not accrue where it is overdue on capital, unless such interest has been due for at least one year and the compounding has been specifically agreed for in an agreement.

The above rules may be considered matters of international public order under Luxembourg law.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

There are no specific Luxembourg laws or regulations in force which restrict loans being made or repaid in a foreign currency.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction.

Yes, under Luxembourg law security can be granted over all of the above listed types of assets, as further explained hereafter.

i. Real property (land) and plant

Land, connected rights and assets attached to the land (such as buildings) can be collateralized under Luxembourg law. The most common approach is the granting of security through a contractual mortgage (*hypothèque*).

To be valid, a Luxembourg law mortgage needs to be evidenced in the form of a notarial deed, passed before a Luxembourg notary (except for mortgages granted in favour of the *Banque et Caisse d'Épargne de l'État*).

Such notarial deed shall clearly identify the mortgaged property and the secured amount. The secured obligations must be certain and liquid, while either the mortgagee must be the person to whom the secured amount is owed or a parallel debt structure needs to be created (as further explained in our answer to Question 14.).

The mortgage deed shall be registered with the mortgage register (*Bureau des Hypothèques*) where the mortgaged property is located and with the Luxembourg Registration Duties, Estates and VAT Authority (*Administration de l'enregistrement, des domaines et de la TVA*).

A contractual mortgage becomes enforceable against third parties upon registration with the competent mortgage register (*Bureau des Hypothèques*). Such registration is valid for a renewable 10-year period.

ii. machinery, equipment and inventory

Security over machinery, equipment or inventory shall take the form of a civil law or commercial law pledge and be executed either by way of a notarial deed or under private seal. The perfection of such pledge requires the transfer of physical possession of the relevant collateral to the secured party and is thus uncommon in practice.

Machinery, equipment and inventory may, however, also be pledged under a pledge over a going concern/business universality (*gage sur fonds de commerce*). Such pledge usually includes all the assets of the pledgor (excluding real estate) such as customers, trademarks and patents, business name and goodwill, rolling stock and other tools, equipment and up to 50% of the value of the inventory. A pledge over a going concern/business universality is subject to specific requirements set out in a Grand Ducal Decree of 27 May 1937 and can only be granted to authorised credit institutions, notaries or breweries. It shall be evidenced in writing and registered with the competent mortgage register (such registration being valid for a renewable 10-year period). Registration is subject to *ad valorem* taxes.

iii. receivables

Security rights over receivables are very common in Luxembourg. They may take two forms: a pledge over receivables or a transfer of ownership by way of security (the latter being rarely used in practice).

Both forms are provided for in the Luxembourg act of 5 August 2005 on financial collateral arrangements, as amended (the "**Luxembourg Collateral Act**") which allows fast and out-of-court enforcement of financial collateral arrangements and contains certain lender friendly provisions in case of bankruptcy.

A pledge over receivables can be created under written private seal and it takes effect between the parties and against third parties as of the date of execution of the pledge agreement.

However, as long as the debtor of the receivables did not have knowledge of the creation of the pledge, such debtor may validly discharge the relevant claim if payment thereof is made to the pledgor. It is hence recommended to make the debtor party to the receivables pledge agreement or to notify the pledge to the debtor with a request of acknowledgment (under which it is also common to obtain from the debtor a waiver of its rights of set-off and of any defence it may have against the pledgor).

Another type of security right over claims governed by the Luxembourg Collateral Act is a pledge over cash accounts opened in Luxembourg. It can be created under written private seal and is perfected towards third parties by the execution of an account pledge agreement between the pledgor and the pledgee and towards the account bank by the sending of a notice and the confirmation by the account bank (usually contained in an acknowledgment form) that it waives all its rights over the relevant account (including the first ranking pledge that Luxembourg banks usually hold over such accounts as per their general terms and conditions). The operation of the pledged account may be freely agreed

upon between parties, without affecting the validity of the pledge.

v. shares in companies incorporated in Luxembourg

Pledges over shares in companies incorporated in Luxembourg are the most common type of security rights (a security assignment is also possible but rarely used in practice).

Such pledges are governed by the Luxembourg Collateral Act and can be created under written private seal.

Their perfection formalities depend on the form of shares pledged. Shares issued by a Luxembourg company are generally issued in registered form and a pledge over such type of shares is perfected by the registration of the pledge in the shareholders' register of the company whose shares are pledged.

Governing law

According to Luxembourg conflict of law rules, Luxembourg courts apply the *lex rei sitae* in relation to the creation, perfection and enforcement of a security interest. Assets located in Luxembourg shall thus be pledged under Luxembourg law governed documents to ensure the due perfection and enforcement of the relevant security rights. Any foreign law perfection requirements for non-Luxembourg parties to such agreements (or foreign debtors in the case of a pledge over receivables) shall also be taken into account.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Under the Luxembourg Collateral Act, it is possible for a pledgor to grant security over present and future qualifying collateral (i.e. financial instruments and claims) without the need to designate them specifically (subject however to certain perfection requirements when the relevant assets come into existence).

Outside the scope of the Luxembourg Collateral Act, it is also in principle possible to grant a commercial law pledge over future assets but given that such pledge requires a physical dispossession of the collateral to be effective, such pledge may be regarded as a mere undertaking to pledge (*promesse de gage*) until the relevant assets come into existence. Finally, mortgages can only be granted over existing assets.

Regarding the possibility to grant security to secure future obligations, the Luxembourg Collateral Act expressly provides for such possibility. It is also possible to grant a civil law/commercial law pledge to secure future obligations. As regards mortgages, they are only valid if they secure certain and liquid obligations determined in the mortgage deed.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

Except for pledges over a going concern/business universality (*gage sur fonds de commerce*), there is no concept of "all asset" security or "floating charge" recognised under Luxembourg law.

Under the Luxembourg Collateral Act, it is possible for a company to pledge all the qualifying collateral (financial instruments and claims) it holds without designating them specifically. However, as different perfection requirements apply depending on the type of assets pledged (typically shares, receivables and bank accounts), it is more common to enter into separate security documents per asset type.

Certain security interests are also subject to a specific regime (e.g. mortgages) and may hence only be documented under a separate agreement/notarial deed (as applicable).

In cross-border financings, it is however common for a Luxembourg obligor to grant a foreign law governed floating charge or debenture but, in such case, it is recommended to exclude any assets located in Luxembourg from the scope of such security (please see our answer to Question 4. regarding the governing law of pledges over assets located in Luxembourg).

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

There are no such requirements under Luxembourg law for security interests governed by the provisions of the Luxembourg Collateral Act nor for most civil law/commercial law pledges.

Mortgages over real estate, aircrafts or ships are evidenced by way of a notarial deed. The same holds true for pledges over a going concern/business universality and pledges over machinery/equipment which can however also be documented in a private

instrument. Powers of attorney are generally granted for the execution of notarial deeds and depending on the place of execution of the power of attorney or of localization/registration of the grantor, certain notarisation and legalisation/apostille requirements may apply.

8. Are there any security registration requirements in your jurisdiction?

Under Luxembourg law, there is no registration requirement in relation to the execution, performance or enforcement of Luxembourg law security agreements, except for mortgages, pledges over a going concern/business universality (*gage sur fonds de commerce*) and security rights over specific types of assets (such as aircrafts, certain vessels, IP rights, etc.).

The Luxembourg Collateral Act requires that a pledge over registered shares shall be recorded in the shareholder register (privately held by Luxembourg companies at their registered office) of the company whose shares are pledged.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?

As a general note, there are no particular material costs related to the taking of Luxembourg law security rights governed by the Luxembourg Collateral Act (unless these are voluntarily registered). Costs are further minimized as their enforcement can be completed without the initiation of court proceedings.

Costs which should be taken into consideration when structuring deals apply to mortgages and pledges over a going concern/business universality (*gage sur fonds de commerce*) and are as follows: (i) a fee of 0.24% on the principal amount of the secured obligations, (ii) a tax of 0.05% on the principal amount of the secured obligations for first registration and renewal (required every 10 years) and (iii) notarial fees calculated based, *inter alia*, on the value of the encumbered asset, the secured amount and the complexity of public searches.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard?

There is no Luxembourg legislation specifically addressing the granting of guarantees or security interests to guarantee/secure the obligations of another group company. The concept of “group of companies” is itself not defined under Luxembourg law.

However, based on French and Belgian court precedents, to which Luxembourg courts may turn for guidance, it is generally admitted that a Luxembourg company may validly grant a guarantee or a third party security for the obligations of a subsidiary, a parent company or an affiliated company if the following cumulative conditions are met:

- The corporate object of the company expressly allows the granting of a guarantee and/or third party security to such group company;
- the company derives a benefit from the giving of the guarantee/third party security;
- the company is a member of a structured group with a common economic strategy; and
- the commitments of the company granting the guarantee and/or third party security are not disproportionate to the commitments of any other group companies involved in the same transaction and do not exceed the company’s financial capacity.

11. Are there any issues that lenders should be aware of when requesting guarantees (for example, financial assistance or lack of corporate benefit)?

Yes. The main issues that lenders should be aware of when requesting a guarantee from a Luxembourg company are as follows:

- **Corporate Object**

The provision of guarantees shall fall within the scope of the company’s corporate purpose, as set out in the corporate object clause contained in its articles of association. If this “corporate purpose test” is not met, the company is still bound towards third parties unless the beneficiary of the guarantee knew or, given the circumstances, could not have been unaware, that the transaction exceeded the corporate object of the company (*ultra vires*), without the mere publication of the articles of association constituting such proof.

- **Corporate Interest**

A Luxembourg company may only provide guarantees to the benefit of third parties if such act is in its corporate interest (*intérêt social*). There is no legal definition of

corporate interest and its concrete interpretation is left to the courts. The concept of corporate interest shall be distinguished from the individual interest of each shareholder as well as from the interest of a majority of shareholders but shall be considered specific to the company. Under certain conditions, the interest of the group to which the company belongs may also justify the granting of a guarantee (please see our answer to Question 10.).

In practice, whether the granting of the guarantee is in the corporate interest of the company is a matter of fact and the management body of the company is responsible for such determination, which shall be made on case-by-case basis and recorded in the minutes of the relevant board meeting approving such guarantee.

The following criteria should, in particular, be taken into account: (i) any direct and/or indirect (economic or commercial) benefit for the guarantor, (ii) balance risks/benefit and (iii) the guarantor's financial means.

Further, the guarantor's position in its corporate group needs to be assessed and, in order to help justify its interest in granting any cross-stream or upstream guarantees, it is market practice in Luxembourg to insert a guarantee limitation language in the relevant guarantee agreement.

The directors/managers of a company have a duty to act in the best interests of the company and they must ensure that the granting of the guarantee by the company meets the "corporate interest test". They may be held personally and civilly liable vis-à-vis the shareholders but also third parties for actions taken in that context. In addition, under certain circumstances, they might incur criminal penalties based on the concept of misappropriation of corporate assets (*abus de biens sociaux*) if they derived a personal benefit from the transaction.

Finally, it cannot be excluded that, if it can be evidenced that the other parties to the transaction knew that the granting of the guarantee was not in the corporate interest of the company, it might be declared void based on the concept of illegal cause (*cause illicite*).

- **Financial Assistance**

Please see our answer to Question 12.

12. Are there any restrictions against providing security to support borrowings incurred for the purposes of acquiring shares: (i) of the company; (ii) of any company which directly/indirectly owns shares in the company; or (iii) in a related company?

Luxembourg public limited liability companies (*sociétés anonymes*) and corporate partnership limited by shares (*sociétés en commandite par actions*) are prohibited from granting loans, guarantees, security interests or advancing funds to a third party for the acquisition of their own shares, unless a whitewash procedure is followed. Such whitewash procedure requires, *inter alia*, sufficient distributable reserves at least equal to the amount of the financial assistance provided and an approval of the shareholders and is rarely used in practice.

The applicability of financial assistance rules to private limited liability companies (*sociétés à responsabilité limitée*) has long been debated but a recent draft law provided some much-needed clarification: the financial assistance prohibition shall not apply to this type of companies.

Unlawful financial assistance may result in the guarantee or security interest being declared void and may trigger civil and criminal liabilities of the target's directors/managers.

The financial assistance prohibition only applies to transactions entered into by a company to support the acquisition of its own shares (and not the shares of its direct or indirect shareholders or of related companies) but the corporate interest of the company granting the assistance shall however always be taken into consideration.

13. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

The Luxembourg Collateral Act specifically provides that a security over financial collateral (i.e. financial instruments or claims) may be provided in favour of a person acting on behalf of the collateral taker, a fiduciary or a trustee in order to secure the claims of third party beneficiaries, whether present or future, provided that these third party beneficiaries are identified or identifiable. As such, a security trustee/security agent can act on behalf of other

syndicate members and hold qualifying collateral/enforce the syndicate rights under the pledge agreement and apply the enforcement proceeds to the claims of all lenders in the syndicate, even where such security agent/security trustee is not itself a creditor of the secured debt.

The recent Luxembourg Act of 10 July 2020 on professional payment guarantees (the "**PPG Act**") also introduced the possibility for a guarantee expressly submitted to such act to be granted in favour of a person acting on behalf of the beneficiaries, of a fiduciary or a trustee, to guarantee third party beneficiaries' present or future claims on the condition that such third-party beneficiaries are identified or identifiable.

Outside the scope of these two acts, the holder of a security interest or the beneficiary of the guarantee shall, in principle, be the same person to whom the secured obligations are owed (please see our answer to Question 14. for the ways to structure this).

14. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

As mentioned in our answer to Question 13., the role of the agent or trustee is recognized where a security right is created over financial collateral (financial instruments and claims) under the Luxembourg Collateral Act or where a guarantee is expressly submitted to the Luxembourg PPG Act.

However, outside the scope of these two acts, the holder of a security right or the beneficiary of a guarantee must be the same person to whom the secured obligations are directly owed as a lender. To address this concern, parallel debt structures under which an appointed third party acts as pledgee/beneficiary and under which parallel debt obligations (i.e. newly created obligations of the borrowers towards the agent mirroring the obligations of the borrowers towards the lenders) are secured, have been accepted in the market (e.g. for pledges over movable property or mortgages). In such case, only the agent would however benefit from a right *in rem* and the underlying creditors only have a contractual recourse against the agent. Such parallel debt structures have however, to our knowledge, never been tested before Luxembourg courts.

15. Does withholding tax arise on (i) payments of interest to domestic or foreign lenders, or (ii) the proceeds of enforcing security or claiming under a guarantee?

Luxembourg does not levy withholding tax on arm's length interest payment, except in case of application of the Luxembourg law of 23 December 2005 (as amended) (the "**Relibi Law**") which foresees a 20% withholding tax in case of payments of interest or similar income, made or deemed to be made by a paying agent established in Luxembourg to or for the benefit of an individual beneficial owner resident of Luxembourg.

Legal entities and structures with no legal personality are in principle out of scope of the Relibi Law. However, according to an administrative circular, if a structure (with or without personality) (e.g. a trust) is interposed between the paying agent and the beneficial owner of the payment in order to avoid the withholding tax, the interest payment may fall under the scope of the Relibi Law by application of the substance over form principle.

Proceeds from enforcement of security interests or guarantees are also not subject to withholding tax in Luxembourg, except that dividend distributed by a Luxembourg company following such a security enforcement (i.e. as a result of the enforcement of a share pledge) may be subject to a 15% withholding tax in Luxembourg (save for the application of the Luxembourg participation exemption regime or a double tax treaty).

16. If payments of interest to foreign lenders are generally subject to withholding tax, what is the standard rate and what is the minimum rate possible under double taxation treaties?

N/A.

17. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

The mere granting of a loan by a foreign lender to a Luxembourg entity or the granting of a guarantee/security by a Luxembourg entity to it, should not cause such foreign lender to be subject to tax in Luxembourg (to the extent the loan or returns thereon are not attributable to a permanent establishment, fixed place of business or permanent representative in Luxembourg). If a loan granted by a foreign lender to a

Luxembourg entity were to be assimilated to a profit participating bond or similar instrument because of its legal features (e.g. variable interest contingent upon the profit distributed by the issuer), interest paid on such bonds could under certain circumstances be subject to withholding tax in Luxembourg.

18. Are there any tax incentives available for foreign lenders lending into your jurisdiction?

No specific tax incentive is available for foreign lenders lending into Luxembourg.

19. Is there a history in your jurisdiction of financing structures being challenged by tax authorities, and if so, can you give examples.

Financing structures are commonly used in Luxembourg for which there is a strong track record of precedents and this is in particular linked to the lender's friendly legal framework. In that context, we do not have knowledge of a history of challenges from the Luxembourg tax authorities in this area.

20. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

The choice of a foreign law (including English law) as the governing law of any agreement entered into by a Luxembourg company is generally recognized and given effect to by Luxembourg courts, subject to certain reservations laid down in Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

A court of competent jurisdiction in Luxembourg may however not apply the chosen foreign law if such choice is abusive and/or if:

- such choice of law is abusive and/or if it is not pleaded and proved;
- such foreign law is contrary to overriding mandatory provisions (*lois de police*) of Luxembourg or other jurisdictions where all other elements relevant to the situation at the time of the parties' choice are located;
- the applicable provisions would be manifestly incompatible with the public policy of Luxembourg or the European Union, or if the obligations arising out of a contract have to be or have been performed in another jurisdiction with applicable mandatory provisions; or
- a party is subject to insolvency proceedings, in which case it would apply, to the effects of such insolvency, the laws of the jurisdiction where such insolvency proceedings were regularly opened (subject to certain exceptions set out in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)).

21. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

New York judgments

Final and conclusive judgments of U.S. courts will be recognized and enforced in Luxembourg without further review of the substantive matters adjudicated thereby or re-examination of the merits of the case, subject to the enforcement (*exequatur*) procedure of the Luxembourg New Code of Civil Procedure. Under Articles 678 *et seq.* of the Luxembourg New Code of Civil Procedure, *exequatur* shall be granted if the Luxembourg court is satisfied that all of the following conditions are met: (i) the foreign court awarding the judgement has jurisdiction to adjudicate the respective matter under applicable foreign rules, and such jurisdiction is recognised by Luxembourg private international and local law; (ii) the foreign judgement is enforceable in the foreign jurisdiction; (iii) the foreign court has acted in accordance with its own procedural laws; (iv) the judgement was granted following proceedings where the counterparty had the opportunity to appear, and if it appeared, to present a defence; and (v) the foreign judgement does not contravene public policy (*ordre public*) as understood under the laws of Luxembourg or has been given in proceedings of a criminal nature.

English judgments

Since Brexit, the *exequatur* procedure laid down above shall also apply to the enforcement of English courts judgments, except if the relevant agreement includes an exclusive choice of court clause. In case of such exclusive choice of jurisdiction, the enforcement

procedure of the Convention of 30 June 2005 on Choice of Court Agreements (the "**Hague Convention**"), as construed by Luxembourg courts, shall apply.

New York Arbitration Convention

Luxembourg is a party to the New York Arbitration Convention, which was ratified by Luxembourg pursuant to a law dated 20 May 1983.

22. What (briefly) is the insolvency process in your jurisdiction?

In accordance with the provisions of Article 437 of the Luxembourg Commercial Code ("**LCC**"), the Luxembourg Commercial Court (the "**Court**") can open bankruptcy proceedings in relation to a company if (and only if) the following cumulative conditions are met: (a) the company is unable to pay its debts as they become due out of its own cash flow (i.e. due and payable liabilities exceed available assets (*cessation de paiements*)) and (b) the company is unable to obtain additional credit from its creditors or third parties (e.g. banks) (*ébranlement du credit*).

The payment term of all claims against the bankrupt company is accelerated upon the adjudication in bankruptcy. As for the administration of the bankruptcy, Articles 444 and 466 LCC provide that the managers/directors of the bankrupt company will be released from office as from the date of the adjudication in bankruptcy and a trustee in bankruptcy (*curateur*) will be appointed by the Court to manage the bankrupt company's affairs and realise its assets in accordance with the provisions of the LCC. The trustee in bankruptcy must act as a reasonably prudent person (*bon père de famille*) in the management of the bankruptcy and shall act in the interest of the bankrupt company and the company's creditors as a whole (*masse des créanciers*). It shall perform its functions under the supervision of a bankruptcy judge (*juge-commissaire*) with the objective of *inter alia* (a) managing the bankrupt company's affairs (as the incumbent managers/directors are released from office), (b) immediately realising perishable assets, with the prior approval of the bankruptcy judge, (c) selling immovable assets with prior court authorization and (d) distributing the proceeds from the realised assets to creditors.

Pursuant to Article 496 LCC, the trustee in bankruptcy acting in the interest of the company's creditors as a whole, will inform the creditors of the opening of the bankruptcy proceedings through publications as well as personal letters so that the creditors of the company are in a position to file their respective claims. In terms of claims' filing deadlines, no distinction is made between foreign creditors and local creditors, but the bankruptcy judge may grant foreign creditors extensions for filing deadlines in certain circumstances.

Further steps shall be implemented towards the satisfaction of the declared and admitted claims to the bankruptcy, as per the provisions of Articles 528 *et seq.* of the LCC:

- the trustee in bankruptcy will prepare the distribution plan;
- a meeting of the company's creditors (i.e. creditors whose claims have been admitted to the bankruptcy) will be convened, and the distribution plan will be submitted by the trustee in bankruptcy for approval by the bankruptcy judge only. Creditors can object to the distribution plan; and
- once approval is obtained from the bankruptcy judge and all the assets have been distributed accordingly, the trustee in bankruptcy will then request the Court to close the bankruptcy proceedings. If the bankrupt company were then to be *in boni*, it would automatically continue as a going concern following the Court's judgement closing the bankruptcy proceedings.

23. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

In accordance with the provisions of Article 444 LCC, the bankrupt company shall be prevented from administering its assets as from the date on which it is declared bankrupt by the Court and all payments, transactions and acts carried out by the debtor as from the date of the adjudication in bankruptcy shall be deemed null and void, including the enforcement of any security granted over the bankrupt company's assets to a lender.

However, the Luxembourg Collateral Act contains an important exception to this principle and increases the protection of collateral holders as it enables secured creditors holding qualifying collateral to enforce their security interests notwithstanding the insolvency of the collateral provider, subject to restrictions which exist in case of fraud.

24. Please comment on transactions voidable upon insolvency.

The Court may determine the period for which payments

shall be suspended, as per the provisions of Article 442 LCC. It shall set a date prior to the adjudication in bankruptcy, as from which time the company shall be deemed to be in a state of suspension of payments (*cessation de paiements*). Such hardening period or doubtful period (*période suspecte*) cannot be set more than six months and ten days prior to the date of the adjudication in bankruptcy. Certain acts and transactions carried out during such hardening period may be voided.

Article 445 LCC provides for the *ipso jure* voidance of certain acts and transactions carried out during the hardening period. The transactions and acts referred to in Article 445 LCC are (a) transactions transferring property without reasonable consideration, (b) payments by whatsoever means of debts that are not due yet, (c) payments of debts by non-cash means, and (d) the grant of security for debts contracted prior to the start of the hardening period.

Article 446 LCC provides that the Court may declare void all other payments made by the company for debts that are due, and all other transactions made in return for consideration, if the other party was aware of the company's inability to meet its payment obligations. However, the fact that the other party knew about the company's financial distress does not necessarily mean that it was also aware of the company's inability to meet its payment obligations.

Finally, Article 448 LCC and Article 1167 of the Luxembourg Civil Code, both relating to fraudulent conveyance (*actio pauliana*) each enable a creditor to challenge any fraudulent payment, transaction or transfer made prior to the bankruptcy of the company, without any time limit.

However, as mentioned in our answer to Question 23., Luxembourg security interests falling within the scope of the Luxembourg Collateral Act, as well as their enforcement measures remain valid and enforceable against third parties (including a bankruptcy trustee) even if entered into during the hardening period (save in case of fraud).

25. Is set off recognised on insolvency?

The LCC generally prohibits set-off (either legal, judicial or contractual) of pre-existing claims to the extent they were not liquid, payable and fungible (*liquide, exigible, fongible*) prior to the adjudication in bankruptcy, except for statutory set-off where the claims are related and interdependent (*créances connexes*) (i.e. they arise from mutual obligations under the same agreement concluded before the hardening period (*période suspecte*)), or if the conditions for statutory set off (i.e., the claims and cross-claims are liquid, due and mutual) were met prior to the adjudication in bankruptcy. In addition, netting arrangements governed by the Luxembourg Collateral Act remain valid and enforceable against third parties despite the opening of insolvency proceedings.

The general prohibition of set-off in the context of bankruptcy (save for the exceptions mentioned above) ensures that all creditors of the bankrupt company are treated equally and is in line with the purpose and intent of Article 444 LCC, which provides that the debtor shall be prevented from administering its assets as from the date on which it is declared insolvent by the competent court and that all payments, transactions and acts carried out by the debtor as from the date of the adjudication in bankruptcy shall be deemed null and void.

26. Can you comment generally on the success of foreign creditors in enforcing their security and successfully recovering their outstandings on insolvency?

Security interests governed by the Luxembourg Collateral Act can be enforced by collateral holders (whether foreign-based or local creditors) notwithstanding the insolvency of the collateral provider, but subject to restrictions which exist in case of fraud. These collateral holders will be paid in priority to other creditors (subject to mandatory privileges arising by law) on the proceeds deriving from a realization of said collateral, therefore greatly improving the chances of a successful recovery by the collateral holders of their outstanding claims in insolvency. The same holds true for mortgagees who may freely enforce their mortgage despite the adjudication in bankruptcy of the mortgagor and are considered as being outside the bankruptcy estate (*hors masse*) (subject also to mandatory privileges arising by law).

27. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

No, but it is worth mentioning that an extensive reform of Luxembourg insolvency laws has been in the works since the release of the draft bill N° 6539 on business preservation and the modernisation of bankruptcy law on 26 February 2013 (the "**Draft Insolvency Bill**"). It is likely that the Draft Insolvency Bill will be revised in order to implement Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on

discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, since it needs to be implemented in national law by 17 July 2021. Both instruments aim to cover generally similar issues and share the same objectives (i.e. prevention of insolvency situations and introduction of new and more flexible and efficient reorganization tools).

28. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

Although there is neither any official statistics nor publicly available data in Luxembourg to support this statement, we have seen a clear uptick in the proportion of lending provided to Luxembourg companies by alternative credit providers over the past few years. Debt funds have in particular gained a significant market share. 70 % of the top 30 debt fund managers worldwide are present in Luxembourg.

It is also worth mentioning that Luxembourg is the leading venue in Europe for the listing of high yield debt securities issued by Luxembourg issuers or foreign issuers.

29. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as (i) Brexit (ii) LIBOR transition and/or (iii) COVID 19

Brexit

Since Brexit, we have seen an increasing number of enquiries around potential licensing requirements in matters involving UK lenders (please see our answer to Question 1. regarding lending in Luxembourg by non-EU based entities).

As a result of Brexit, we have also seen a trend emerging on the market whereby more and more lenders/sponsors are willing to use Luxembourg law as the governing law of facility agreements.

Covid-19

The Covid-19 outbreak has had an impact on secured lending transactions. As in other jurisdictions, there have been discussions around the possibility to work around the requirement of using wet-ink signatures. Under Luxembourg law, it is possible to use electronic signatures but only qualified electronic signatures (within the meaning of the Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC) meeting certain requirements will have the same probative force as handwritten signatures.

Certain measures have also been implemented, allowing in particular companies – even if their articles of association determine otherwise – to hold board meetings without a physical meeting, by any means of communication allowing board members' identification and suspending the deadline foreseen by the LCC according to which any debtor which enters in a state of cessation of payments shall, within a month, file for bankruptcy with the clerk's office of the competent court. These measures are currently applicable until 30 June 2021 (unless further extended).

Several financial support measures have also been adopted by the Luxembourg government further to the outbreak of the Covid-19 pandemic but they generally do not apply to typical cross-border secured lending transactions.

Other considerations linked to Covid-19 should also be taken into account when drafting certain finance documents (such as the potential impact of the pandemic on contractual force majeure).

LIBOR transition

Luxembourg contractual issues related to the LIBOR transition are generally similar to those encountered in other jurisdictions. A market standard replacement language is usually agreed between the parties.

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