

## Insolvency & Restructuring - Luxembourg

### New right to reclaim data from bankrupt cloud computing providers

Contributed by [NautaDutilh Avocats Luxembourg](#)

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### Introduction

On June 11 2013 the Chamber of Deputies voted in favour of a law introducing a right to claim back intangible and non-fungible movable assets from a bankrupt company. According to the explanatory memorandum, the law is intended to allow for the recovery of data from bankrupt providers of distance IT services or cloud computing solutions. The law provides greater certainty as to the consequences of the bankruptcy of a cloud services provider regarding the data that it holds, and contributes significantly to Luxembourg's strong reputation as a centre of excellence for IT outsourcing.

### Separable assets

The law clarifies that the intangible assets in question must be 'separable' from other intangible assets upon the opening of bankruptcy proceedings. In the cloud computing context, this means that the data must be capable of being separated from other data in the cloud services provider's IT environment. This does not require that the data already be separated upon the opening of the proceedings, but only that such a separation be possible. In order to avoid any issues in this respect, clients should ensure that their contracts provide for segregation or ring-fencing of data. In Luxembourg, the regulatory authorities on IT outsourcing in the financial sector already require such segregation to be in place from the outset of the outsourced data storage arrangement.

### Exercising data recovery right

The law stipulates that the data recovery costs must be borne by the claimant, with the explanatory memorandum specifying that such costs include "data separation costs". In order to avoid contention on this point, it is recommended that contracts include provisions on the data recovery costs as well as the framework for the technical restitution, taking into particular consideration whether such a transfer of data entails the deletion of the data by the cloud services provider.

### Other applications

The term 'intangible movable assets' is obviously not restricted to cloud data. Thus, where a party commissions a marketing company to manage its client lists, this party would, in the event of the bankruptcy of the marketing company, be able to reclaim these lists without a lengthy and arduous process.

### Comment

In general, the introduction of a right to recover data held by a third party is an excellent initiative. The law offers some guidance for bankruptcy trustees with regard to the restitution of cloud-held data and, despite there being no specific provision to that end, essentially obliges trustees to continue the activities of the bankrupt business until completion of the transfer, and not to terminate immediately the employment contracts of the IT employees that are indispensable to transferring the data from the cloud service provider to the client.

However, this is only a step in the right direction. The same right should be introduced for other insolvency-related or winding-up scenarios, the latter of which is in the process of being reformed.

Furthermore, several other issues should be addressed, such as the extent to which the trustee in bankruptcy could refuse to return the intangible assets (eg, in case of a payment default of the customer claiming the recovery of the assets).

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