Luxembourg: Insolvency proceedings

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Questions

What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

Under the laws of the Grand Duchy of Luxembourg (Luxembourg) several types of insolvency proceedings are available for commercial companies bearing the form of a private limited liability company (*société à responsabilité limitée*), a public limited liability company (*société anonyme*) or a partnership limited by shares (*société en commandite par actions*) (a debtor):

- bankruptcy (*faillite*): regulated under articles 437 to 592 of the Luxembourg Commercial Code (*Code de Commerce*) (the LCC) is the most common type of insolvency proceeding. It applies to a debtor which is (i) unable to pay its debts as they fall due (*dettes certaines, liquides et exigibles*), which characterises a state of cessation of payments (*cessation de paiements*), and (ii) has lost its creditworthiness (*ébranlement de crédit*)
- controlled management (*gestion contrôlée*): regulated by the Luxembourg Grand Ducal Decree of 24 May 1935 (the Decree). It can be applied for by a debtor which is facing financial difficulties and is considered by the Luxembourg district court (*Tribunal d'arrondissement de Luxembourg*) sitting in commercial matters (the Commercial Court) to have real prospects of either (i) reorganising and restructuring its debts and business or (ii) realising its assets in the best interest of creditors
- suspension of payments (*sursis de paiement*): regulated under articles 593 ff. of the LCC. This procedure applies to a debtor who is unable to face its financial obligations due to unexpected events but after examination of its balance sheet, has enough assets to pay all its debts or can bring back to balance its assets and liabilities. It is rarely used in practice and will not be discussed in detail. It is not to be confused with (i) the suspension of payments provided by the Luxembourg Act of 5 April 1993 on the financial sector, as amended (the Financial Sector Act) applicable to credit institutions and other establishments managing funds for third parties, and (ii) the suspension of payments provided by the Luxembourg Act of 6 December 1991 on the insurance sector (the Insurance Sector Act), applicable to insurance undertakings; and
- composition with creditors (*concordat préventif de faillite*): regulated by the Luxembourg Act of 14 April 1886. Its purpose is to obtain a restructuring of the debtor's liabilities. There are no specific criteria for opening such proceedings. the only conditions are that the debtor should file an application before the courts with all documents supporting the request, justifying its state and having obtained the consent from the majority of its creditors representing 3/4 of the claims. This procedure is very rarely used due to the sacrifices it requires from creditors and will not be treated in detail.

For the sake of completeness, it is worth mentioning two additional procedures although they do not fall within the strict definition of an insolvency proceeding. Article 203 of the Luxembourg act on commercial companies dated 10 August 1915, as amended (the Companies Act) provides for a procedure of compulsory winding up for companies which do not comply with certain of its provisions. Further, Luxembourg criminal law provides for special proceedings in the form of a *banqueroute simple or banqueroute fraduleuse*). Such proceedings can be found in the LCC and the Luxembourg Criminal Code. They are applicable to the debtor subject to bankruptcy which has committed one or several criminal offenses listed therein.

A draft act amending and restating Luxembourg insolvency proceedings has been presented to the Parliament on 1st February 2013 (draft act no. 6539 related to protection against corporate insolvency). The bill is aimed at modernising Luxembourg insolvency proceedings. The adoption of this new law will result in substantial modifications of the legal framework for insolvency proceedings in Luxembourg.

What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Commercial Courts, together with a person acting as *curateur*, *liquidateur* or *commissaire* as relevant, appointed by the Commercial Court for the purpose of insolvency proceedings in Luxembourg (the Insolvency Officer) will thus have the subject-matter jurisdiction to open and deal with insolvency proceedings. A *juge-commissaire* will also be appointed during bankruptcy proceedings.

Article 21 of the New Civil Proceedings Code provides that district courts have exclusive jurisdiction on matters which, due to their nature, are expressly attributed to them by law, and article 635 of the LCC grants specific jurisdiction to the Commercial Court for all insolvency related matters. Consequently the Commercial Court, which has opened the insolvency proceedings will have jurisdiction for all actions which strictly arise as a consequence of such insolvency.

Insolvency proceedings apply to merchants (including commercial companies) and cover business assets. In certain areas of law, the Commercial Court will refer the matter to the competent court (eg for labour claims, the Commercial Court shall refer parties before the labour courts, for criminal claims in case of *banqueroute*, criminal courts will have independent and concurrent jurisdiction on several points to assess the same facts as the Commercial Courts).

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

Entities which do not fall within the territorial jurisdiction of Luxembourg courts are excluded from Luxembourg customary insolvency proceedings.

Article 437 LCC and Luxembourg case law provides that such insolvency proceedings are for the sole benefit of merchants. As a consequence, private individuals and public entities are also excluded from such insolvency proceedings (the Luxembourg law of 8 January 2013 on over-indebtedness introduces a civil bankruptcy regime for private persons).

Specific insolvency regimes apply to 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.

Assets can be excluded from insolvency proceedings due to the immunity granted by specific texts: in Luxembourg, only specific entities can benefit from immunity from suit, attachment of assets or execution of judgment such as States, public-law entities and diplomatic personal, when their activities are related to the exercise of public functions. Luxembourg has signed and ratified the Basel Convention on State Immunity on 16 May 1972. The United Nations Convention on jurisdictional immunities of States and their properties, adopted by the United Nations General Assembly on 2 December 2004 (Resolution 59/38) has not yet been ratified in Luxembourg. Contractual waivers of immunity, may be recognized by Luxembourg courts and are enforceable to the extent they do not contravene Luxembourg international public policy.

In the framework of a bankruptcy proceeding opened against a natural person debtor, a Luxembourg court has also excluded from the scope of the assets covered by such proceeding (and exempt from claims of creditors), the proceeds from a new activity of such debtor (whether commercial or industrial), within the limit of what he needs to support himself and his family, as well as the costs relating to this new activity. The portion which exceeds such exclusions will fall under the common pledge of creditors.

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

There is currently no specific national regulation addressing the insolvency of 'too big to fail' entities. However, specific insolvency regimes exist in relation to banks and professionals of the financial sector (Financial Sector Act), establishments

managing funds for third parties (Financial Sector Act), insurance and reinsurance companies and pension funds (Insurance Sector Act), regulated investment funds (Luxembourg act of 17 December 2010 on undertakings for collective investments), investment companies in risk capital ('SICAR' organised under the act of 15 June 2004 as amended), alternative investment funds managers (Luxembourg act of 12 July 2013 on alternative investment funds managers) and securitisation entities (Luxembourg act of 22 March 2004 on securitisation as amended (the Securitisation Act)).

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

Immoveable property can be secured by a mortgage (*hypothèque*), which is a non-possessory registered security right. Mortgages are the most common type of security over immovable property. A mortgage is created by a notarial deed (*acte authentique*) and is rendered effective as against third parties by registration with the mortgage register. The registration is valid and enforceable against third parties for ten years and is renewable in unlimited ten years increments, provided that neither the underlying debt for which the mortgage was created nor the 10 year term itself, are extinguished.

Immoveable property can also be secured through *antichrèse*. This type of security is a very rarely used registered pledge with transfer of possession of the real estate property to the secured creditor.

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

General civil law pledge

Security rights over moveable personal property are created by a civil law pledge under the Luxembourg Civil Code (*Code Civil*). Civil law pledges can be granted over most categories of movable property, either tangible or intangible, on present and future assets, and also on fungible goods, such as agricultural products. A civil law pledge is created by written agreement and does not allow the pledgee to re-use the collateral (*droit d'utilisation*). The perfection of a pledge over movable personal property requires a physical delivery of the secured assets from the pledgor to the secured creditor.

Upon a default, the pledgee may keep the relevant collateral following judicial attribution (but not through self-help appropriation) or sell it through public auction and satisfy itself from the proceeds of sale. Any surplus will be reimbursed to the pledgor or insolvency officer, as the case may be, or any other person entitled to it by law.

Specific law pledges

Collateral Act

The entry into force of the Collateral Act has created a 'safe haven' for creditors holding a financial collateral. Article 20 (4) of the Luxembourg act on financial collateral arrangements dated 5 August 2005, as amended (the Collateral Act) provides that, except for the provisions of the law of 8 January 2013 on over-indebtedness (*surendettement*), financial collateral arrangements created under the Collateral Act are protected against insolvency proceedings an any form of attachments (*saisies*) and enforceable notwithstanding any Luxembourg insolvency proceeding. This protection extends to foreign security interests where the provider of financial collateral or of any other similar collateral to which a foreign law applies is established or resides in Luxembourg. Article 21 of the Collateral Act provides in particular that 'netting agreements and financial collateral arrangements, as well as the provision of collateral in accordance with a financial collateral arrangement, entered into on the day of commencement of a reorganisation measure or winding-up proceedings, but before the official judicial decision to open such proceedings or before the measure becomes effective, shall be valid and enforceable against third parties, administrators, liquidators, receivers and similar persons'. This provision is of key importance as, despite provisions of Luxembourg insolvency law to the contrary (in particular Article 445 LCC), it enables collateral holders to realise their collateral notwithstanding the insolvency of the collateral provider, but subject to restrictions which exist in case of fraud.

A pledge under the collateral act is created by a written agreement between the pledgor and the pledgee (or its security representative) and may extend to both present and future collateral without any need to specifically designate such collateral. It may secure present and future obligations.

Under the Collateral Act, the security interest can be granted over financial instruments or receivables.

Pledge over financial instruments

For uncertificated registered shares/equity securities, the pledge is perfected as against the issuer and third parties by registration (*inscription*) of the owner or security representative in a register held by the issuer at its registered office in Luxembourg.

If these shares (or equity instruments) are materialized through a certificate (and are not held in global form by a global depositary), the rights attached to such instrument are vested with the bearer once the instrument is physically acquired. The perfection is effective by physical delivery (*tradition manuelle*) to the pledgee or to an agreed third party custodian (*tiers convenu*).

Pledge over receivables

Security rights over rights to claim payment of a monetary sum (*créances de sommes d'argent*) governed by the Collateral Act can take the form of a pledge or transfer of title for security purposes. It takes effect and is perfected as against the assigned debtor and third parties as of the date of execution of the pledge agreement or the security assignment. The assigned debtor may validly discharge its obligations towards the pledgor/transferor as long as it has no knowledge of the pledge/transfer of the contractual right. Therefore, a notice of pledge/assignment remains a common practical step to ensure that the assigned debtor cannot act in good faith on any apparent authority and is properly instructed as to whom any payments may be directed.

Security rights over cash accounts or securities accounts governed by the Collateral Act can take the form of an account pledge or transfer of title for security purposes. These security rights are not considered to bear on the cash or on the securities but on the claim of the pledgor/assignor against the depository bank where the cash or the securities are on deposited. It takes effect and is perfected as of the date of execution of the agreement.

Intellectual property ("IP")

IP rights are normally subject to security rights in the form of the general civil law pledge. To be enforceable against third parties, pledges over registered IP rights must be registered with the Benelux Office for Intellectual Property, with the Intellectual Property Department of the Luxembourg Ministry of Economy or with the European Patent Office. Pledges over unregistered IP rights (such as copyrights) are created by private agreement and perfected through notification to the debtor.

Aircrafts and ships

Luxembourg security rights over aircraft are created under the Aircraft Mortgages Act of 29 March 1978 on the recognition of rights in aircraft in the form of a mortgage. In order to be enforceable against third parties, Luxembourg aircraft mortgages will have to be registered with the aircraft mortgage register (*Bureau de la conservation des hypothèques aériennes*) in addition to a registration with the Luxembourg Administration of Registrations and Domains (*Administration de l'Enregistrement et des Domaines*).

Security rights over vessels are granted by way of ship mortgage under the Inland Vessel Mortgages Act or under the Maritime Mortgages Act. The registration of such security interests in the inland ship mortgage register (*Bureau de la conservation des hypothèques fluviales*) or the maritime mortgage register (*Bureau de la conservation des hypothèques maritimes*), is required.

Business universality

Pursuant to the Grand-Ducal Decree of 27 May 1937, as amended, a pledge over a business universality (*gage sur fonds de commerce*) can only be granted to authorized credit institutions and breweries. It requires a written agreement, and will be enforceable as against third parties after its registration at the mortgage register. The pledge covers only 50% of the stock (if any) of the pledgor, and is valid for a renewable ten year period and a duty is levied on the secured amount.

Fiduciary contracts

The law of 27 July 2003 provides for the possibility of transferring ownership of assets by way of security organised under a fiduciary contract. The security created under a fiduciary contract (*fiducie-sûreté*) is immune against bankruptcy and benefits from a legal protection through the segregation of the fiduciary estate held by the transferor.

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

An attachment proceeding can be initiated on the debtor's moveable and immoveable assets, prior to the opening of an insolvency proceeding. After the commencement of an insolvency proceeding, all rights of unsecured creditors, and those of creditors holding non-possessory security are suspended. In practice, a dispute upon such attachment may take several months. If an insolvency proceeding is initiated against the debtor before the attachment is judicially validated by a final judgment, it will be impossible to complete the process and the relevant assets will fall within the common pledge of all creditors.

Under bankruptcy proceedings, creditors will have to file their claims with the secretariat (*greffe*) of the Commercial Court and will have no other means whatsoever to direct or intervene in the business of the insolvent company. After having converted all available assets of the company into cash and after having determined all the company's liabilities, the bankruptcy receiver will distribute the proceeds of the sale, on a *pro rata* basis following the rank established previously.

Under controlled management proceedings (*gestion contrôlée*), the Commercial Court which has upheld the application of the debtor for a controlled management proceeding (*gestion contrôlée*) will appoint an investigating judge (*juge délégué*). As from this day, any subsequent enforcement proceedings or acts are stayed and creditors will be paid either pursuant to the provisions of the plan, or following realisation of the debtor's assets.

Article 497 LCC allows the *juge-commissaire* to extend the period of time within which creditors must file their claims when it deems it necessary and when any such creditor is domiciled or resides outside Luxembourg. However the Court of Appeal of Luxembourg has held that the period of time within which a foreign creditor has to form an appeal cannot be extended.

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

Under the Companies Act, the shareholders of a commercial company may decide to initiate voluntary winding-up proceedings. In the absence of any agreement to the contrary, the method of liquidation shall be determined and the liquidators appointed by the general meeting of shareholders. Liquidators may bring and defend any action on behalf of the company, receive any payments and, without prejudice to the rights of creditors benefiting from liens or mortgages, they shall pay all the debts of the company.

Under the Decree, a voluntary liquidation may occur during controlled management (*gestion contrôlée*) in case the procedure leads to the realisation of the assets of the debtor.

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Any unpaid creditor may request initiation of involuntary bankruptcy (*faillite*) proceedings by (i) summoning the debtor before the Commercial Court and (ii) providing proof that the debtor is unable to obtain credit (*ébranlement du crédit*) and has ceased payments and is unable to meet its commitments (*cessation des paiements*).

Bankruptcy (*faillite*) proceedings aim at organising the realisation of a debtor's assets and allocating the proceeds to its creditors. Creditors cannot initiate the involuntary reorganization (*controlled management*) of the debtor.

What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

A formal financial reorganisation can be made through controlled management (*gestion contrôlée*), composition with creditors (*concordat préventif de faillite*) or suspension of payments (*sursis de paiement*). Suspension of payments is almost never used in practice. An agreement with creditors is not very common and if obtained is done so by a debtor submitting an application to the court justifying that it is at that time unable to face its financial obligations and having obtained the consent from the majority of its creditors, representing 3/4 of the claims

Controlled management (*gestion contrôlée*) can be applied for by a debtor who is not in a position to completely fulfil his obligations and wants to either (i) restructure his business or (ii) realize its assets in good conditions. It is optional for the debtor who will not be liable if he chooses not to file for this proceeding.

From the beginning of the controlled management (*gestion contrôlée*), the debtor will lose the right to freely dispose of his assets, and no creditor will be entitled to individually enforce his rights, except for security rights created under the Collateral Act. A restructuring plan should be communicated to creditors and guarantors. The plan will be adopted if the majority of creditors representing the majority of the claims as well as the court approve it. In this case, the plan will be published and binding on all parties.

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Creditors cannot initiate an involuntary reorganisation on behalf of their debtor or against his will. Reorganisations are only available for the Debtors themselves.

Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result?

The management of a debtor is required to file for bankruptcy (*faillite*) within one month from the date the debtor became unable to obtain credit (*crédit ébranlé*) and is considered in a state of cessation of payments (*état de cessation de paiement*). Otherwise, it could be held criminally and civilly liable.

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? 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?

Under a composition with creditors (*concordat préventif de faillite*), the debtor may not make any commitments, secure or grant any mortgages without the authorisation of the Insolvency Officer, until a plan is adopted. Once the plan is adopted, the debtor shall act within the frame of the latter.

Under a controlled management (*gestion contrôlée*), until the plan is adopted the debtor remains in charge of its own business (even after it has filed for such proceeding). After the composition plan is adopted, the court will appoint an Insolvency Officer whose consent will be required every time the debtor wishes to dispose of its assets such as borrowing, guaranteeing, selling or making commitments. In addition, the debtor will have to comply with every measures imposed under the plan which has been adopted, as well as with measures that may be imposed from time to time by the Insolvency Officer. Article 5 of the Decree introduces the concept of body of creditors (*masse des créanciers*) (hereinafter referred to as, the 'Body of Creditors') in controlled management proceedings. Each claim considered to be a claim against the Body of Creditors (*masse des créanciers*) should be paid upon the assets of the debtors, before every other creditor. Creditors have no role to play with regard to the ongoing business of the debtor except that they can approve or reject the reorganisation plan.

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?

The opening of an insolvency proceeding produces an immediate suspension of individual proceedings against the debtor. During both bankruptcy and reorganisation proceedings, the rights of unsecured creditors, and those of creditors holding non-possessory security are suspended. No enforcement action is permitted against the bankrupt. All individual proceedings have to be exercised against the Insolvency Officer through the filing of claims.

A holder of a pledge or a mortgage has a general priority over the Body of Creditors (*masse des créanciers*) and may hold on to the mortgage or pledge until it receives payment and retains the ability to enforce its rights by way of seizure and public auction while the debtor is in bankruptcy (*faillite*). Secured creditors holding qualifying collateral under the Collateral Act will be entitled to enforce their rights without the Commercial Court's approval.

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

Neither in bankruptcy nor in controlled management (*gestion contrôlée*) is the debtor entitled to borrow money or grant a guarantee or security on his own. Such operations require the authorization or will be decided upon by the Insolvency Officer.

Under bankruptcy proceedings, Insolvency Officers usually do not enter into credit agreements since the purpose of this procedure is to realise the assets of the debtor in order to pay its creditors. However, this is not formally prohibited and could very well happen if the Insolvency Officer deems it necessary and is himself authorized by the court.

Under controlled management proceedings (*gestion contrôlée*), this is far more usual. The Decree provides that a company may not, without the Insolvency Officer's prior approval and under penalty of nullity of the transaction, borrow money, receive funds or grant pledges or mortgages.

To what extent are creditors able to 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?

Under Luxembourg law, a set-off can be either judicial, legal or contractual.

The rights of unsecured creditors, and those of creditors holding non-possessory security are suspended during bankruptcy and controlled management proceedings (*gestion contrôlée*). No payments, in one form or another, can be made unless authorised by the Insolvency Officer or with the authorisation of the Commercial Court. As a consequence, set-off which is considered to be a means of payment, is prohibited during controlled management (*gestion contrôlée*) and bankruptcy. However, an Insolvency Officer will apply legal set-off during the bankruptcy or controlled management proceeding (*gestion contrôlée*) if the two debts (the debt towards the creditor and the one towards the debtor) became liquid and have fallen due before the bankruptcy judgment, or (ii) the two debts are connected (*connexes*), which means that they arise from mutual obligations (*obligations réciproques*) and from the same indivisible cause (*cause indivisible*).

In addition, the Collateral Act renders valid and enforceable all netting agreements created thereunder and before the official judicial decision opening the insolvency proceeding, irrespective of the maturity of the claims as well as their object.

Finally, it should be underlined that the opening of insolvency proceedings shall not affect the right of creditors to request the set-off of their claims against the claims of the debtor where such set-off is permitted by the law applicable to the insolvent debtor's claim.

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? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Under controlled management proceedings (*gestion contrôlée*), the debtor may not dispose of its assets without the Insolvency Officer's prior approval. The reorganisation plan should include either the sale or the repartition of some of the debtor's assets. Under bankruptcy proceedings, article 477 LCC provides that the Insolvency Officer, with the *juge-commissaire's* approval, can immediately sell perishable movable assets. In its capacity as debtor's attorney, the liquidator will sell the assets without asking for guarantees but will choose the best offer. Normally the purchaser will acquire the assets free and clear of any claim and free and clear of any pledge or mortgage.

In principle, it is possible to achieve a restructuring outside a formal procedure. If a Luxembourg company faces difficulties but is not in a state where filing for bankruptcy would be compulsory, parties are free to contractually restructure the debt, although this is not common thing. However, no creditor can be forced to accept and concur to such restructuring and different kind of liabilities could survive to the sale of assets (or entire business) and remain attached thereto.

The concept of 'stalking horse bids' during the sale of assets does not exist under Luxembourg law.

May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

In general, contracts are not affected by the opening of an insolvency proceeding despite the stay of proceedings. As a consequence, the Insolvency Officer can very well choose to continue the IP right agreement and will be bound by its provisions.

Can a debtor undergoing a 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?

As a general principle, contracts will automatically continue following the opening of a bankruptcy or controlled management (*gestion contrôlée*) proceeding.

The debtor cannot reject or disclaim a contract after the judgment opening the insolvency proceeding. However, upon establishing that it is in the interest of creditors, the Insolvency Officer may request that the insolvency judge terminates an agreement to which the debtor is a party.

How frequently is arbitration used in insolvency proceedings? What limitations are there on the availability of arbitration in insolvency cases? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

An insolvency proceeding is always regulated by law. No insolvency proceeding may exist outside the judicial frame.

However, it cannot be excluded that an Insolvency Officer decides to continue a contract after the opening of the insolvency proceeding, which contains an arbitration clause.

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

The legal framework within which the controlled management (*gestion contrôlée*) shall take place is set up by the Decree. There are numerous mandatory provisions throughout the procedure: the purpose of the procedure is the reorganisation of the business or the realisation of the assets, and the procedure will be commenced by a court order further to a petition filed by the debtor who demonstrates that its creditworthiness is impaired, and can no longer fulfil its payment obligations and that the procedure will allow it to continue its business or ensure the orderly realisation of assets. The suspension of creditors' enforcement rights is also mandatory for the duration of the controlled management (*gestion contrôlée*). During that time, all decisions must be approved by the Insolvency Officer. The debtor may not grant pledges, mortgages or make commitments without the prior approval of the court.

The draft reorganisation plan shall take into account all interests at stake and comply with the ranking of privileges and mortgages. Each claim that arises after the opening of the controlled management (*gestion contrôlée*) shall be considered as a claim against the Body of Creditors (*masse des créanciers*) and thus treated preferentially. The plan will be drawn up and ratified by the court if a majority of the creditors representing, via their claims which have not been challenged by the administrators (*commissaires*), at least half of the debtor's liabilities have agreed thereto. The judgment which approves the draft plan is mandatory for the debtor, its creditors, as well as joint co-debtors and personal guarantors.

Controlled management (*gestion contrôlée*) as well as composition proceedings are only available to good faith debtors. The application for composition must be based on a composition proposal. A composition assembly (*assemblée concordataire*) is to be convened at which a delegate judge (*juge délégué*) renders a report on the composition proposal. Composition with creditors (*concordat préventif de faillite*) may only be adopted (i) if a majority of creditors representing, via their unchallenged claims, three quarters of the debtor's liabilities, adhere to the composition proposal, and (ii) after the composition proposal is homologated by the Commercial Court.

Do procedures exist for expedited reorganisations?

There are no provisions regarding expedited reorganisations under Luxembourg law.

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?

In case the proposed plan of composition (*concordat préventif de faillite*) or controlled management (*gestion contrôlée*) is rejected, either by the Commercial Court or by more than half of the creditors representing more than half of the unchallenged claims of the debtor, the insolvency court may pronounce the opening of bankruptcy proceedings against the debtor. The same applies in case a plan was approved and then violated by the debtor.

During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings 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 insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

Under composition with creditors (*concordat préventif de faillite*), the Commercial Court, in its decision to grant composition with creditors to the debtor, will convene a creditors' meeting and the convening notice and extracts of the decision shall be published within three days in the newspapers designated in such decision. In addition, the Commercial Court may convene each creditor by letters with acknowledgement of receipt, in any case at least eight days prior to the date of such meeting. The decision ratifying the plan shall be published in the same newspapers within three days. The publication date sets the beginning of the legal period for creditors to challenge the decision.

Under controlled management (*gestion contrôlée*), once the proposed plan is established, it is communicated to the creditors for approval and published in the Luxembourg Official Gazette (*Mémorial C, Sociétés et Associations*). Within fifteen days following such information, creditors shall provide to the Commercial Court their approval, rejection or observations regarding the proposed plan. The decision approving the proposed plan shall be published in a similar manner.

Under bankruptcy proceedings, the Commercial Court, in its decision to open bankruptcy proceedings, will invite the debtor's creditors to file their claims within a certain period (which shall not exceed twenty days after the date of the decision), and will indicate the dates of future hearings relating to creditors' claims. Extracts of the decision will be published in the newspapers designated therein, within three days, the publication date being the beginning of the legal period of fifteen days for creditors to challenge the decision.

With respect to creditors located or residing outside Luxembourg, the insolvency judge may extend the deadline for filing claims with respect to such creditors.

In any case, following any filing of a claim and prior to the hearing relating to such claim, the insolvency judge will be entitled to summon the relevant creditor to appear before the Commercial Court and provide further information. The decision of the Commercial Court shall then determine the claims eligible to distributions in the bankruptcy proceedings.

If the insolvency administrator 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?

Irrespective of the type of insolvency proceedings, rights of creditors are in principle suspended (save for creditors with security interests governed by the Collateral Act) and any actions and claims of the debtor shall be pursued either by the debtor or the Insolvency Officer, as the case may be.

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?

Under the law of 30 June 1930 on the creation of creditors' committees for the safeguard of creditors' interests during bankruptcy and composition with creditors (*concordat préventif de faillite*) proceedings, the insolvency judge (*juge-commissaire*) shall, within fifteen days following the declaration of bankruptcy (*déclaration de faillite*), appoint a creditors' committee with three members chosen amongst the main unsecured creditors of the debtor, each residing or established in Luxembourg (the Committee). Specific rules shall apply to the appointment and dismissal of Committee's members, it being noted that they shall not receive remuneration for their services as Committee members.

The Commercial Court may consider that the appointment of a Committee shall not be required if the insolvency proceedings are likely to be closed for lack of sufficient assets (*clôture pour insuffisance d'actifs*) or by liquidation.

In addition, a Committee shall also be formed if, six months after the opening of insolvency proceedings against the debtor, such insolvency proceedings are not yet closed, either by a judicial decision to close the bankruptcy proceedings or by a judicial decision to ratify the composition plan (*concordat préventif de faillite*).

In insolvency 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? May assets be transferred from an administration in your country to an administration in another country?

The parent and its subsidiaries are considered to be separate legal entities. There can in principle be no combined insolvency proceedings and each company should be considered individually for insolvency purposes.

However, according to Belgian case law upon which Luxembourg courts could base their decision, a parent company, ultimate parent or beneficial owner who effectively manages a subsidiary instead of the subsidiary's formally appointed managers, could be subject to a court-ordered bankruptcy extension in which case the parent company or beneficial owner, as the case may be would also be declared bankrupt if the following conditions are met: (i) the parent caused the subsidiary to act in the parent's individual interest, (ii) the parent used the subsidiary's assets for its individual purposes, or (iii) the parent carried on a loss-making business in the parent's individual interest.

The Commercial Court has, in the BCCI liquidation, taken into consideration the concept of insolvency of a group and accepted a pooling arrangement. The Council regulation EC no. 1346/2000 of 29 May 2000 on insolvency proceedings (the Insolvency Regulation) provides for the transfer of assets from secondary proceedings to the liquidator or receiver of the main proceeding.

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

Under composition with creditors (*concordat préventif de faillite*), creditors shall file their claims within the deadline indicated in the decision opening the insolvency proceeding. Creditors which have not filed their claims timely will be allowed, in certain circumstances, to file their claims until the last distribution of assets is made. They shall however not be entitled to any monies with respect to assets distributed under previous distributions.

Under Bankruptcy proceedings, the Commercial Court, in its decision to open bankruptcy proceedings, will invite the debtor's creditors to file their claims within a certain time period (which shall not exceed twenty days after the date of the decision), and will indicate the dates of future hearings relating to creditors' claims. With respect to creditors located or residing outside Luxembourg, the insolvency judge may extend the period to file claims with respect to such creditors. The decision of the Commercial Court shall then determine the claims eligible to distributions in the bankruptcy proceedings.

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

During bankruptcy proceedings and composition with creditors (*concordat préventif de faillite*), creditors shall submit their claims to the Insolvency Officer in order to establish the list of claims and the distribution plan, and decide upon the status of challenged claims, if any.

The rank of creditors will depend on the existence of any privilege or mandatory preferential right or any security right over the debtor's assets. Creditors which do not benefit of such rights would be deemed unsecured creditors and will be treated equally, in accordance with the principle of equal treatment of creditors.

The question of 'ranking' of a creditor will therefore be relevant only with respect to secured or preferred creditors. Should such creditor's security or preferential right be deemed void by the court, the ranking of such creditor would be affected.

An insolvency judge may invalidate any general Civil law security rights granted during the hardening period and/or any mortgages/preferential rights registered more than fifteen days after the coming into existence of the security right (otherwise the registered mortgage/preferential right will be protected in the bankruptcy proceedings). The same applies to any fraudulent preference, transaction or transfer made prior to bankruptcy of the debtor, without limitation of time. Such invalidation may therefore affect the relevant creditor's ranking.

Preferential rights being mandatorily provided by law, the Commercial Court will in principle not be authorized to change the ranking of a preferred creditor.

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

Statutory liens or preferential rights enjoy a super priority over other secured and unsecured creditors, in addition to a general priority over the Body of Creditors (*masse des créanciers*). They include, for example, claims of the courts and insolvency officials, and the tax and social security authorities. Preferred creditors have either a 'special' preferential right/lien over a specific asset of the debtor or a 'general' preferential right over all of the debtor's assets. In general, a preferred creditor whose lien relates to a specific asset must be satisfied from the sales proceeds of this asset whereas a preferred creditor with a general lien can be satisfied from the sales proceeds of any assets not subject to a special preferential right/lien and from any surplus of the sale of assets subject to a special preferential right/lien.

The Insolvency Officer appointed by the court and in charge of the proceedings will pay first the costs and the disbursements made for the administration of the bankruptcy (which includes the fees of the Insolvency Officer, all bankruptcy administration costs, all disbursements made in the interest of the liquidation of the bankruptcy, *etc*). In general, the priority of preferential rights in the bankruptcy is as follows (without limitation):

- legal expenses incurred after the opening of an insolvency proceeding in the interest of all the creditors;
- employee claims (to a certain extent)
- social security contributions (share to be paid by the employees)
- claims in favour of Luxembourg tax authorities
- social security contributions (share to be paid by the employer); and
- contributions to professional associations

In general, a secured creditor who benefits from a general Civil law security created under the Luxembourg Civil Code (such as a pledge over movable property, over intellectual property rights or a pledge over a going concern/business universality) retains its right to dispose of the pledge and its enforcement right by way of judicial attribution or sale through public auction, because it is considered 'out of the mass', does not participate or compete the Body of Creditors (*masse des créanciers*) as regards the distribution of the realisation proceeds. However, general preference rights will prime any beneficiary of a general Civil law security created under the Luxembourg Civil Code and any unsecured creditor, in application of Articles 2101 and 2104 of the Luxembourg Civil Code (*Code civil*), while it is likely that creditors holding security under the Collateral Act should prevail (even though the Collateral Act does not state this explicitly).

In general, preferential rights will take precedence over the rights of mortgagees in application of the Article 2095 of the Luxembourg Civil Code and will therefore be paid in priority on the proceeds of sale of the collateral (please refer to the paragraph a. above regarding preferential rights). Under Article 2103 of the Luxembourg Civil Code, some statutory preferred creditors prime the mortgagee, but rank after the owners of preferential rights.

What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

Under composition with creditors (*concordat préventif de faillite*) and controlled management (*gestion contrôlée*), until the opening of the insolvency proceeding against the debtor or the express termination of employment contracts by the Insolvency Officer, employment contracts shall remain in place for the continuation of activity, if any.

Under bankruptcy proceedings, according to Article L.125-1 of the Labour Code (*Code du Travail*), employment contracts are terminated with immediate effect when a company is declared bankrupt. Each employee must be granted the wages due to him or her for the month in which the declaration of bankruptcy is made and for the following month. Moreover, the employees must be granted 50% of their monthly salary corresponding to the notice period to which they are entitled. However, such compensation may not exceed the total amount to which the employee would be entitled in the event of dismissal with notice.

The amounts (salaries and wages) owed to employees for the last six months of work and all compensation due as a result of termination of the employment contracts, up to an amount equal to six times the minimum reference salary, must be paid before any payments can be made to secured creditors. The Labour Fund (*Fonds pour l'Emploi*) guarantees the above-mentioned amounts owed by the debtor to the employees, and shall pay the employees at the request of the Insolvency Officer. Following its payment, the Labour Fund will be subrogated in the rights of the relevant employees and become a preferred creditor of the debtor in the bankruptcy proceedings.

What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims? (Please distinguish between actuarial deficiencies in pension assets on the one hand and unpaid contributions to pension plans on the other.)

Pension-related claims against employers do not fall within the scope of employees claims and therefore, they do not benefit from the preferential right attached to employees claims. Under the mandatory pension regime, any individual exercising a remunerated activity in Luxembourg (for their own account or for a third party) shall be insured under the general insurance regime for pensions, for the time corresponding to such activities. Each of the employees and the debtor shall bear a part of the monthly payments to be made to the National Insurance Pension Fund (*Caisse National d'Assurance Pension*). In case the debtor fails to make payments to the National Insurance Pension Fund, such entity will have a claim against the debtor and rank as a preferred creditor of the debtor during its bankruptcy or insolvency proceedings. The same is applicable for any other authorised public entity to which periodic payments are to be made by the debtor in relation to social contributions (*eg assurance dépendance, assurance accident, assurance maladie*).

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

Under bankruptcy proceedings and controlled management proceedings (*gestion contrôlée*) which are converted into bankruptcy proceedings, following the liquidation of all the debtor's assets and the distribution of such assets to the creditors, the Commercial Court will pronounce the closing of proceeding and the dissolution of the debtor, even if the available assets are not sufficient to satisfy all the debtor's creditors. No further claim shall be admissible by any creditor against the debtor, unless (i) the debtor returns to a better financial situation within seven years, or (ii) the debtor was convicted for simple or fraudulent bankruptcy.

In case of composition with creditors (*concordat préventif de faillite*), the debtor will be required to satisfy all remaining claims if it benefited from the reorganisation and returned to a better financial situation.

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

Under bankruptcy proceedings, the bankruptcy order provides for a period of time during which creditors must file their claims with the clerk's office of the Commercial Court, but creditors shall have no means whatsoever to direct or intervene in the administration/business of the insolvent company. After having converted all available assets of the company into cash and after having determined all the company's liabilities (based upon the creditors' claims and within the timeframe set by the bankruptcy order), the Insolvency Officer will distribute the proceeds of the sale, on a *pro rata* basis, to the creditors after deduction of the Insolvency Officer fees and the bankruptcy administration costs, and following the rank established previously but the Insolvency Officer and the competent court (including with respect to preferred creditors, if any). Creditors which do not file their claims would not be included in the distribution of proceeds by the Insolvency Officer.

The same should apply for controlled management proceedings (gestion contrôlée) where the Commercial Court ascertains that the company is unable to pay its creditors and converts the controlled management (*gestion contrôlée*) into a bankruptcy proceeding.

In case of composition with creditors (*concordat préventif de faillite*), the plan approved by the Commercial Court will set out how and when the distributions shall be made. Preferred creditors will be paid first, followed by unsecured creditors in accordance with their claims and the distribution plan.

Finally, it is worth mentioning that Luxembourg case law allows the principle of equal treatment of creditors (usually considered to be of public order) to be altered if it appears to be in the interest of the creditors taken as a whole.

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

In accordance with Articles 445 and 446 LCC, the insolvency judge (*juge-commissaire*) may cancel payments and other transactions entered into or performed during the hardening period upon motion by the Insolvency Officer. As such, an insolvency judge (*juge-commissaire*) may invalidate any general civil law security rights granted during the hardening period and/or any mortgages/preferential rights registered more than fifteen days after the coming into existence of the security right (otherwise the registered mortgage/preferential right will be protected in the bankruptcy proceedings).

In addition, under Article 448 LCC, any transaction or payment made in fraud of the creditors' rights should be set aside by the insolvency court, notwithstanding the time when they were made (including prior to the suspect period).

As a consequence, claims relating to such void payments or transactions will not be admitted to the list of claims nor be paid during the liquidation and distribution processes.

Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

General principle

The insolvency proceeding which is most commonly used in practice is the bankruptcy (*faillite*). In the event of bankruptcy, the debtor is prevented from administering its assets as from the date on which it is declared insolvent by the Commercial Court (Article 444 LCC). All payments, transactions and acts made by the bankrupt debtor as from the date of the adjudication in bankruptcy shall be deemed null and void. The relevant court, either on its own initiative or after the commencement of proceedings by an interested party, shall determine the period for which payments shall be suspended (Article 442 LCC). The court 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*). In such case, the lenders will be stayed from enforcing their right to repayment against the Luxembourg loan party.

In addition, Article 445 LCC provides for the voidance of certain acts and transactions carried out prior to the adjudication in bankruptcy during the hardening period, which may extend to a maximum of six months and ten days prior to the adjudication date. The transactions and acts referred to in Article 445 LCC are: (i) transactions transferring property without reasonable consideration; (ii) payments by whatsoever means of debts that are not due yet; (iii) payments of debts by non-cash means; and (iv) the granting of security for debts contracted prior to the start of the hardening period.

All other payments made by the bankrupt debtor for debts that are due, and all other transactions made in return for consideration, may be declared void by the court if the other party was aware of the suspension of payments. However, the fact that the other party knew about the debtor's financial distress does not necessarily mean that it was also aware of the suspension of payments (Article 446 LCC).

The hardening period cannot be set more than six months prior to the date of the adjudication in bankruptcy. Irrespective of the hardening period referred to above, Article 448 LCC and Article 1167 of the Luxembourg Civil Code, both relating to fraudulent conveyance (or paulian action, *actio pauliana*) enable a lender to challenge any fraudulent preference, transaction or transfer made prior to bankruptcy of a Luxembourg company, without limitation of time.

Exceptions to the hardening period

There are a few statutory exceptions to the rules governing the hardening period. The Collateral Act contains an important exception and increases the protection of collateral holders under Luxembourg law. Article 21 of the Collateral Act enables collateral holders to realise their collateral notwithstanding the bankruptcy, controlled management (*gestion contrôlée*) or composition with creditors (*concordat préventif de faillite*) of the collateral provider, but subject to restrictions which exist in case of fraud. Another exception is set forth in Article 55 of the Securitisation Act which contains special provisions governing the insolvency of an assignor when future claims are assigned to a securitisation undertaking.

Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Directors' liability towards their company is based on an agency agreement (*mandat*) between the company and each director, which imposes them a duty of care. Under normal circumstances, the expected behaviour of a director is that of a normal prudent and reasonable person (*bon père de famille*) in respect of its own affairs, having the benefit, when making a decision, of the same knowledge and information as any director acting in the same circumstances (the standard of care may be more onerous in the case of special skills that the company relies upon and where the director receives remuneration). Directors are thus potentially liable to the company for any misconduct in the management of the company's affairs. In accordance with Luxembourg court precedent, misconduct does not imply a fault on the part of a director; a director may incur liability for its passive attitude, its negligence and its carelessness. In addition, negligent performance of their duty of information/accountability (*reddition des comptes*) may trigger liability. Typically, it should not be possible to make a director liable for misconduct by reason of taking a decision, to the extent that such decision is based on information which appears to be sufficient and trustworthy (even if not independently verified) and in the absence of any indication that the decision, although it may entail a risk, could be contrary to the interest of the company. In addition to being liable for own actions, directors are potentially liable for a breach of a duty of care committed by fellow directors that form part of the management board even if the individual director was not part of such breach.

In addition, directors may be held liable in tort (*responsabilité délictuelle*) under Articles 1382 ff of the Luxembourg Civil Code. The success of an action in tort liability depends on the plaintiff:

- proving its damage which can consist in an actual loss or in the non-realisation of a benefit;
- proving a 'fault' (*faute*) by the defendant, ie wilful misconduct, negligence or carelessness, but intent is not required; and
- establishing the causal link between his damage and the misrepresentation.

Tort action against the members of the management board will be available to the company itself (represented by its shareholders) and/or third parties, provided that they evidence an interest bringing such action.

Directors can be held liable for pre-bankruptcy actions where those actions contributed to end-up in the cessation of payments of the Company. For instance under the LCC, a director may be personally declared bankrupt, among others, if he has used the company to hide or cover a commercial activity made in his personal interest, if he has disposed of the corporate assets as his own assets, or if he has, in an abusive manner and in his personal interest, continued a loss-making activity that was to end up in a cessation of payments, or if he has failed to declare the bankruptcy of the company within the 30 days following the cessation of payments of the company.

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

Third parties may have a direct action against shareholders of a company if one or all of the shareholders have actively interfered in the management of the company. In such scenario, a court may decide that they have acted as *de facto* directors. As a result, the above mentioned rules applicable to directors will also apply to the relevant shareholder(s) who will face the same potential liability as the actual directors.

In particular, the shareholders acting as *de facto* directors may be declared personally liable if they: (i) on behalf of the company, acted in their own interests; or (ii) disposed of the company's property as their own; or (iii) improperly pursued, for their own benefit, an operating deficit when it was clear that this would lead to a suspension of payments.

The court may order the shareholder(s) who acted as *de facto* directors to bear all or part of the debts of the company, if their gross negligence contributed to the debtor's insolvency (Article 495-1 LCC) and if the insolvency is considered to be fraudulent (Articles 573 to 578 LCC).

Some of the following examples can be found in Luxembourg case law and legal writings in relation to the mingling of assets, debt contribution action and the abusive dominance of subsidiaries by the parent or affiliated company in a corporate group

Only in certain very limited cases whereby a group company would bear excessive risks disproportionate to its net assets and financial position, a court might take the view that such company would never have taken such risk as a fully independent entity. In order to evaluate the risks taken on by the group company, the court will consider the individual interest of each entity involved but, also, the general group interest and might allow some policies to be adopted in the benefit of such group interest. Indeed, in certain cases, for the benefit of the entire group, if, the subsidiaries might be allowed to bear exceptional or additional liabilities to the extent, in particular if such affiliated subsidiaries are compensated by present or future financial benefits.

Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

In accordance with Article 446 LCC, any payments and transactions made by the debtor following its cessation of payments (cessation de paiements) may be declared void if creditors, when dealing with the debtor, had knowledge of such state of cessation of payments.

Such creditors shall not be eligible to file their claims in the bankruptcy proceedings. The assessment of whether the creditors had prior knowledge of the debtor financial situation shall be made by the Commercial Court on a case-by-case basis.

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?

Upon the opening of an insolvency proceeding, individual actions of unsecured creditors are suspended. As a result, no seizure shall be possible over the debtor's assets following the opening of such insolvency proceeding, unless it is made by the Insolvency Receiver.

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

Voluntary or judicial liquidation proceedings may be conducted with respect to a debtor, outside insolvency proceedings. Voluntary liquidation proceedings shall be conducted by appointed liquidators or, if none are appointed, by the managers/directors of the debtor. Once the liquidation is completed, the liquidators shall make a report to the general meeting of shareholders regarding the employment of corporate assets and shall present supporting documents and account, to be then reviewed by the debtor's auditors. Notice of completion of the liquidation shall be published for information of third parties.

The Commercial Court can order, at the request of the public prosecutor, the dissolution and winding-up of a company that pursues activities which constitute a criminal offence or violate the provisions of the LCC or the legislation on commercial companies, including the laws governing authorisations to do business (for example, the requirement to approve and file annual accounts on time).

How are liquidation and reorganisation cases formally concluded?

Composition proceedings end with a decision of the Commercial Court. The court may revoke the composition in case the debtor is convicted for fraudulent bankruptcy after the ratification of the composition plan or in case of non-execution of the composition plan by the debtor. In case the debtor benefitted from composition proceedings and returned to a better financial situation, it would have to reimburse any claim which remained outstanding at the closing of composition proceedings.

Controlled management proceedings (*gestion contrôlée*) either end with the rehabilitation of the debtor or the opening of bankruptcy proceedings. In case the debtor returns to a better financial situation, it will submit a request of rehabilitation to the Commercial Court which will decide upon the lifting or the continuation of the controlled management (*gestion contrôlée*).

Under bankruptcy proceedings, when the assets of the debtor appear to be insufficient to cover all the outstanding claims, the Commercial Court may, upon report of the insolvency judge, decide to close the bankruptcy proceedings. Once bankruptcy proceedings are closed, remaining creditors of the debtor shall be entitled to engage individual actions. However, the debtor shall not be subject to any further proceedings of its creditors if it was not convicted for simple or fraudulent bankruptcy, unless it returns to a better fortune within seven years after the closing of bankruptcy proceedings.

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? 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? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Treatment of foreign creditors

Unsecured creditors are treated equally during insolvency proceedings. However, the insolvency judge may grant an additional time to foreign creditors for the filing of their claims. In addition, foreign creditors are required to elect domicile at the register (*greffe*) of the Commercial Court where insolvency proceedings are opened.

Recognition of foreign judgements

Final and conclusive judgments of the courts within the territorial jurisdiction of any state which is a member of the European Union or the European Economic Area (a member state) 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, in accordance with the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, as amended from time to time.

The recognition and the enforcement in Luxembourg of final and conclusive judgments of a court within the territorial jurisdiction of another member state (based on legal proceedings commenced by valid service of process) is subject to the applicable enforcement (exequatur) procedure of the Jurisdiction Regulation or the Council Regulation (EC) No 805/2004 of 21 April 2004 creating a European enforcement order for uncontested claims, as the case may be, both as construed and applied by Luxembourg courts, and provided the recognition of the judgment may not be refused on the grounds specified at Articles 34 and 35 of the Jurisdiction Regulation. The formal enforcement of a foreign decision may be obtained by submitting a motion for exequatur to the president of the competent Luxembourg district court. The following evidence must be attached to the motion:

- the original or certified true copy of the court decision, translated into French
- the original or certified true copy of the formal service of process to the parties involved, translated into French; and
- a certificate from the court, establishing that no recourse or appeal lies from the court decision (ie a certificate demonstrating that the decision is final and conclusive), translated into French

International treaties and conventions

Luxembourg is party to several conventions and treaties regarding the recognition of foreign judgments, including the Insolvency Regulation. With respect to countries which are not covered by the Insolvency Regulation, Luxembourg signed the Istanbul Convention of 5 June 1990 on certain aspects of bankruptcy however this Convention has not yet been ratified by Luxembourg.

The UNCITRAL Model Law on Cross-Border Insolvency has not been implemented in Luxembourg.

Does your country's system allow 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?

Save for cooperation duties in the context of European insolvency proceedings, there is no specific duty for the Commercial Court and the Insolvency Receiver to cooperate with foreign courts and officers, in case of cross-border insolvency proceedings. Luxembourg private international law scholars admit the principle of universality of insolvency proceedings. As a consequence, Luxembourg courts may recognise foreign proceedings when the conditions for recognition of foreign judgments are met, and provided that such foreign proceedings do not conflict with a domestic insolvency proceeding.

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 is no particular framework for cooperation between insolvency officers, outside the scope of the insolvency regulation. Cross-border cooperation between insolvency officers has been accepted in certain high-profile insolvency cases (eg the BCCI case, the Lehman Brothers case, etc).

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