Luxembourg

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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Luxembourg?

Security may be given by way of (i) a *sûreté réelle* or (ii) a *sûreté personelle*.

In case of a *sûreté réelle*, specified assets, which may be the property of the debtor himself or of a third party (in which case such third party obviously needs to concur to the constitution of the security), guarantee the due fulfilment, by the debtor, of his obligations. In case of a *sûreté personelle*, a third party is personally guaranteeing the due fulfilment, by the debtor, of his obligations. Within the first category (*sûreté réelle*), the kind of security will depend on the nature of the asset given as security. Movable things (*biens mobiliers*) whether tangible (such as certain goods) or intangible (such as a bank deposit in cash or a securities deposit), will be granted as security by way of pledge (*gage*) and/or, where claims and financial instruments form the subject matter of the security, by way of transfer of property for security purposes. Real estate will be granted as security by way of a mortgage (*hypothèque*).

A *sûreté personelle* will take the form of a personal guarantee (*caution*). Where a *sûreté réelle* is granted on assets owned by a person different from the principal debtor, it will qualify as *cautionnement réel*, even though this concept is the matter of a debate in legal writing.

Security in the broader sense of the term can however also be obtained via certain other contractual mechanisms or arrangements, such as repurchase transactions (*repos*), set-off and netting arrangements and property reservation clauses.

Luxembourg legislation with regard to security over assets which qualify as "claims" or "financial instruments" has undergone significant changes as a result of a law of 5 August 2005 on financial collateral arrangements (to be referred to hereafter as "the financial collateral law") which implements Directive 2002/47 of June 6, 2002 on financial collateral arrangements into Luxembourg law. The financial collateral law in particular aims at making financial collateral arrangements "bankruptcy proof". It is worth noting that the Luxembourg legislator has chosen to broaden the scope of application of the new legal provisions as per what was required for the purpose of properly transposing the EU Directive. The Luxembourg law indeed applies irrespective the quality of the parties to an agreement qualifying as a financial collateral arrangement pursuant to the law.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

The most common insolvency procedure provided for by Luxembourg law is the *faillite* (to be referred to hereafter as "bankruptcy" or "*faillite*") which is governed by articles 440 ff of the Luxembourg *Code de Commerce*. While Luxembourg law provides for other types of insolvency proceedings and while faillite strictly speaking is not applicable to companies engaging in certain specified activities, such as in particular banks and insurance companies (see below under question 2.1), many (but not all) of the main substantive provisions applicable in case of *faillite*, will, or rather may, also be made applicable in other kinds of insolvency proceedings.

Article 444 of the *Code de Commerce* provides that in case of faillite, the insolvent debtor ("*le failli*") is deprived from the administration of his assets as from the date on which he is declared in bankruptcy by the competent court (being the District Court sitting in commercial matters (to be referred to, hereafter, as "the Court")). The bankruptcy judgment sets a date prior to the bankruptcy decision as from which the company will be deemed to have been insolvent ("*en cessation de paiements*"). Such date of cessation de paiements can be set to a date up to 6 months prior to the bankruptcy judgment and, in fact, is systematically and without further scrutiny fixed at such earliest possible date. The period from the date so determined until the bankruptcy decision is referred to as the "preference period" (*période suspecte*). The concept of preference period is among the most central concepts of Luxembourg insolvency law because transactions made during that period are particularly vulnerable to attack.

In particular, certain transactions and acts defined in article 445 of the *Code de Commerce*, if made during the preference period (and up to 10 days before), are void by operation of law and shall thus be annulled by the Court upon application of the *curateur* ("the bankruptcy administrator"). The transactions and acts referred to in article 445 are (i) transactions transmitting property without any or without reasonable counterpart; (ii) payments, made by whatever means, of debts which were not yet due; (iii) payments of debts made otherwise than in cash (or by cheque and similar payment instruments); and (iv) security granted for debts previously incurred. An important exception to the rule in (iv) arises from the previously mentioned financial collateral law.

Article 446 of the *Code de Commerce* further provides that all other payments and transactions made by the *failli* during the preference period may be annulled by the Court if they have been made or entered into while the other interested party (beneficiary of the payment; co-contractant…) was aware of the *cessation de paiements*.

Article 447 of the *Code de Commerce* provides that mortgages constituted during the preference period (and up to ten days before) may be declared void by the Court if there have been more than 15 days between the day on which the mortgage has been created and the day on which it has been duly registered.

Finally, article 448 of the *Code de Commerce* provides that *all* transactions and payments made fraudulently against the other creditors' interests are null and void, whatever be the date on which they have been made.

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Luxembourg?

Article 440 of the *Code de Commerce* obliges the directors of a company which is incapable to meet its payment obligations to, within a month's time from such *cessation des paiements*, declare the same at the *greffe* (*secretariat*) of the Court.

If directors do not comply with this obligation, different types of sanctions may apply. A possible sanction is the prohibition to further engage in a commercial activity. In certain circumstances, the directors may also be condemned as "*banqueroutier simple*" or as "*banqueroutier frauduleux*", each of these is a criminal offence subject to a fine and, at least in theory, to imprisonment.

The civil liability of directors continuing to trade where a company is in financial difficulties remains in principle subject to the ordinary rules of directors' liability but continuing to trade while the company has ceased to meet its payment obligations will, so to say, by definition amount to faultive behaviour on the part of the directors. Without prejudice to the application of the ordinary rules of director's liabilities, article 495-1 of the *Code de Commerce* in addition, provides that where directors' gross negligence has caused or contributed to the occurrence of bankruptcy, the Court may decide that they will have to bear part of the debts of the bankruptcy.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Luxembourg?

The applicable procedure depends on (i) the nature of the difficulties a company is facing and (ii) the activity pursued by the company.

The following types of procedures are provided for by Luxembourg law for general corporates which are domiciled in Luxembourg and are not governed by a special legislation as mentioned hereafter:

- *Faillite* (bankruptcy) (articles 437 ff of the *Code de Commerce*).
- *Gestion contrôlée* (controlled management) (grand-ducal decree of 24 May 1935).
- *Sursis de paiement* (*suspension of paiements*) (articles 593 ff of the *Code de Commerce*).
- *Concordat préventif de faillite* (composition with creditors, law of 14 April 1886).

Article 203 of the Luxembourg law on commercial companies of 10 August 1915 further provides for a procedure of compulsory winding up (*liquidation judiciaire*) but rather than to companies in financial difficulties, this procedure applies to companies which do not comply with certain requirements of company law such as the requirement to file annual accounts in due time, in fact a company, subject to liquidation judiciaire can later on, if insolvent, be declared bankrupt.

The procedures of sursis de paiement as provided for by the *Code de Commerce* and *concordat préventif de faillite* are hardly used at all in present times, and will therefore not be discussed further hereafter, being noted that the *sursis de paiement* provided for by the *Code de Commerce* is not to be mixed up with sursis de paiement proceedings provided for by financial sector laws as set out below.

Faillite is, as mentioned earlier, the most common insolvency procedure applicable to companies which appear unable to meet their obligations towards their creditors.

Controlled management (*gestion contrôlée*) is available in circumstances where there is a perspective for the business of a company, which is momentaneously unable to face its obligations to be redressed or where such procedure might enhance an orderly realisation of the company's assets in the best interest of all creditors. This procedure is applied from time to time but is rarely successful and is often followed by *faillite* proceedings. It is worth noting that gestion contrôlée is occasionally applied for by companies, and in particular holding or finance companies, which form part of an international group and whose inability to meet their obligations is the result of a default at the overall group level.

A significant amount of uncertainty as to whether a Luxembourg incorporated company will, at the end of the day, be subject to the insolvency proceedings provided for by Luxembourg law, arises from the (often somehow erratic and unpredictable) application of the "centre of main interest" (COMI) criteria provided for by EC regulation n° 1346/2000 on insolvency proceedings of 29 May 2000. Another, somewhat similar, uncertainty may arise from the fact that Luxembourg company law applies the so-called "real seat" system, meaning that a company will be considered to have its domicile at the place where its central administration is located, which does not necessarily coincide with its place of incorporation. For the sake of good order, it should be mentioned that both the COMI and the real seat criteria may also result in foreign incorporated companies becoming subject to Luxembourg insolvency laws. The uncertainty so arising is particularly critical where and to the extent that it results in uncertainty as to the effectiveness (and enforceability) of certain contractual arrangements such as, typically, pledges or set off clauses.

Certain types of companies, mainly of the financial sector, such as banks and all other professionals of the financial sector which manage third party funds, insurance companies, undertakings for collective investments (FCPs, SICAVs or SICAFs), investment companies in risk capital (SICARs) or securitisation vehicles are subject to special winding up and/or insolvency proceedings. These special proceedings make a distinction between (i) an observation/preliminary period during which the company benefits from a suspension of its payment obligations and is managed under the supervision of court appointed administrators (*commissaires*) (such procedure to be referred to hereafter as "sursis de paiement" (suspension of payment)) and (ii) a liquidation phase if it appears that the business cannot be redressed and/or pursued (such procedure to be referred to hereafter as "*liquidation*" (liquidation)). These proceedings provide the Court with a great amount of flexibility as to the rules to be applied, particularly, when it comes to liquidation. Typically, indeed, the relevant legal provisions provide that when opening sursis de paiement or liquidation proceedings, the court will determine the rules according to which these proceedings will take place.

The limited space available for this contribution makes it impossible to provide information regarding the insolvency proceedings relating to each of the types of companies mentioned above. Therefore, and because the provisions applicable to banks and other professionals of the financial sector managing third party funds have inspired most of the provisions applicable to the various

types of companies enumerated above, we shall, hereafter, only refer to the insolvency proceedings provisions contained in the law of 5th April 1993 on the financial sector (hereafter "the financial sector law"). It needs however to be noted that while the entities falling within the scope of the special insolvency proceedings provided by the financial sector law and the insurance company law are "exempted" from the ordinary insolvency proceedings provisions, this is not the case for undertakings for collective investments to which, depending on the circumstances, the ordinary insolvency proceedings may apply notwithstanding the existence of special proceedings.

2.2 What are the tests for insolvency in Luxembourg?

Article 437 of the *Code de Commerce* retains two criteria which have to be met cumulatively: (i) the inability to pay one's debts as they fall due; and (ii) the inability to raise credit.

2.3 On what grounds can the company be placed into each procedure?

Where the ordinary rules on *faillite* apply, a company will be declared bankrupt by the Court if the two conditions contemplated under question 2.2 above are met. A single unpaid debt might be sufficient for that purpose if the inability to raise credit criteria is also met.

As indicated earlier, a company in financial difficulties can apply for *gestion contrôlée* in view of either (i) reorganising its affairs or (ii) realising its assets in better conditions. Courts have ruled that in order for a company to be admissible to *gestion contrôlée*, there needs to be a real "reorganisation" or "ordered liquidation" prospect. Otherwise *gestion contrôlée* should be refused and ordinary bankruptcy instituted.

Sursis de paiement and *liquidation* as provided for by the financial sector law can be instituted including in circumstances other than insolvency and in particular where, for whatever reason, the company's licence has been withdrawn by the regulator.

Article 60-2 of the financial sector law indeed provides that *sursis de paiement* may occur where: (i) the creditworthiness of the company is undermined or it finds itself in a liquidity crisis, whether or not there is a cessation of payments; (ii) the ability of the company to meet its commitments is compromised; or (iii) the company's licence has been withdrawn but such decision is not yet legally final. And article 60-8 of the same law in substance provides that *liquidation* may occur where: (i) suspension of payment has not allowed a redress of the company's situation; (ii) the financial situation of the company is undermined to an extent such that it can no longer meet its commitments; or (iii) the withdrawal of its licence has become final.

2.4 Please describe briefly how the company is placed into each procedure.

Faillite may be instituted by the Court: (i) upon a declaration made by the directors of the company; (ii) upon proceedings instituted by an unpaid creditor; or (iii) by the Court acting on its own initiative upon having received information from various sources on the company's financial difficulties. In the latter case, the representatives of the company have in principle to be previously convened and heard by the Court.

It is for the directors of the company to file an application for controlled management with the Court. If the application is not rejected in the first place, one of the judges composing the Court is appointed to make a report on the business situation of the applicant. It is in the light of this report, always prepared with the assistance of an expert, that the Court decides whether or not to retain the application and, where the application is accepted, appoint one or more administrators (*commissaires*) who shall supervise the management of the company while elaborating a plan in order to reorganise its business.

An application to the Court for *sursis de paiement* as provided for by the financial sector law can only be made by the company itself or by the CSSF, i.e. the regulator of the financial sector.

An application to the Court for *liquidation* as provided for by the same law can only be made by the CSSF or the *Procureur d'Etat* (public prosecutor).

2.5 What notifications and meetings are required after the company has been placed into each procedure?

While, depending on the type of proceedings, certain meetings and/or notifications may be held/required to be held as the proceedings progress, the limited space available in this contribution does not enable us to enter into further detail.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

Whatever be the type of insolvency proceedings, unsecured creditors will not be in a position to enforce their rights once such proceedings are under way.

In ordinary *faillite* proceedings, it is as from the day of the bankruptcy decision that claims can no longer be enforced. In *gestion contrôlée* proceedings, the relevant date is the date on which the Court decides to appoint one of its judges to investigate and make a report on the business of the applicant. In *sursis de paiement* proceedings as provided for by the financial sector law, the relevant date is the one on which the request is filed with the Court. In *liquidation* proceedings as provided for by the same law, it is for the Court to determine the rules according to which the liquidation will be operated. No doubt, however, unsecured creditors will, in practice, be precluded from enforcing their claims individually.

Creditors benefiting from some type of "general preference right" (*privileges généraux*) which does not qualify as a security strictly speaking are, in this respect, treated like unsecured creditors.

3.2 Can secured creditors enforce their security in each procedure?

In faillite proceedings, beneficiaries of security strictly speaking, such as pledges and mortgages, which have been validly instituted, are entitled to enforce their secured claims notwithstanding the bankruptcy.

Article 546 of the *Code de Commerce* on the contrary imposes certain restrictions on the enforceability of certain special preference rights normally benefiting to the seller of movable goods. On the other hand, article 567-1 of the same Code now confirms the validity and enforceability, subject to certain conditions, of express "property reservation clauses" (*clause de réserve de propriété*) in sales agreements of movable goods.

It follows from the provisions of the grand-ducal decree of 1935 that in *gestion contrôlée* proceedings, even the beneficiaries of

pledges and mortgages are, in principle, precluded from enforcing their secured claims. However, as a result of the provisions of the financial collateral law, security falling within the ambit of such law will be enforceable notwithstanding *gestion contrôlée* proceedings.

In case of *sursis de paiement* as provided for by the financial sector law, collateralised claims also appear to be unenforceable except "*with the permission of* (the regulator) or *where the law provides otherwise*". The major "exception" in existence is, again, collateral falling within the ambit of the financial collateral law.

In case of *liquidation* as provided for by the financial sector law, secured claims should, in principle, be enforceable just as in ordinary faillite proceedings.

It should be mentioned that when certain assets located outside Luxembourg have been made the subject matter of a security mechanism which is not similar to security mechanisms known and recognised by Luxembourg law, the recognition and effectiveness of such security in Luxembourg insolvency proceedings may be problematic. This issue is however addressed to a certain extent by the EC insolvency regulation no 1346/2000 and, where insurance companies or credit institutions are at issue, by EC directives no 2001/17 of 19th March 2001 and no 2001/24 of 4th April 2001.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

Pursuant to article 445 of the *Code de Commerce*, set off, including as a result of a set off/netting agreement, is prohibited as of the date of the *faillite*. The courts have ruled that this principle also applies to companies in *gestion contrôlée*. As to whether the post-bankruptcy set off prohibition would apply in *sursis de paiement* and *liquidation* proceedings as provided for by the financial sector law, would depend upon the decision of the Court determining the rules according to which the *sursis de paiement* or *liquidation* should proceed. It may however be assumed that the Court will normally make the traditional post-bankruptcy set off prohibition applicable in such proceedings (subject always to the exceptions set out herebelow).

Case law has however decided, although in a restrictive way, that post-bankruptcy set off is admissible if there is connexity between the mutual claims to be set off, meaning that such claims need to have a common "cause" and, therefore, be indivisible.

At any rate however, the financial collateral law now provides that set off between mutually owed "claims" and "financial instruments" (as further defined by the law) is valid notwithstanding the existence of *any type of insolvency proceedings* if it is the result of transactions which are the subject matter of bilateral or multilateral set off arrangements or clauses. The traditional post-bankruptcy set off prohibition is thus now neutralised to a very large extent.

Where the assets subject to a set off clause are located abroad, set off may further be secured as a result of the provisions of the Council Regulation and EC Directives referred to in question 3.2 herebefore.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

A company in *faillite* is, as indicated under question 1.2 above, disseised of the administration of its assets. It is thus for the bankruptcy administrator to act on behalf of the company under the supervision of a *juge-commissaire* appointed by the Court among its members. The mission of the bankruptcy administrator is to realise the assets of the company and to pay off its debts to the largest extent possible. The directors of the company have no active role to play in the administration of the bankruptcy (but they have an obligation to, whenever necessary, assist the bankruptcy administrator). Nor have the shareholders of the *failli*.

A special decision from the Court is required, pursuant to article 475 of the *Code de Commerce*, in order for the bankruptcy administrator to continue the business of the bankrupt company.

A company in *gestion contrôlée* is managed under the supervision of the court appointed commissaires who will be in charge of authorising all acts of some importance to be performed by the directors and management who continue to be in charge of the company's affairs. If the plan prepared by the commissaires has been approved by the Court and the creditors, the company in principle regains control over its affairs.

The regime of *sursis de paiement* as provided for by the financial sector law is in this respect somewhat similar to the controlled management proceedings while the regime of liquidation provided for by the same law is in this respect rather similar to faillite proceedings.

4.2 How does the company finance these procedures?

In principle, the cost of the insolvency proceedings are to be borne by the company itself and such cost are to be paid prior to pre-bankruptcy creditors' unsecured claims. If the company has insufficient assets to cover such cost, then the state authorities will bear them.

4.3 What is the effect of each procedure on employees?

Article L.125-1 of the *Code du travail* (labour code) states that employment contracts are terminated with immediate effect and by operation of law when a company is declared *en faillite*.

Any amounts due to the employees for the last six months are guaranteed by the *Fonds pour l'emploi* within the limit of six times the amount of the minimum salary.

The other types of insolvency proceedings do not automatically affect the continuation of labour contracts.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

Save for employment contracts in case of *faillite* (see under question 4.3 above), contracts are not, in principle, affected by bankruptcy proceedings. Where the bankruptcy administrator, commissaire or liquidator will wish to terminate a contract otherwise than in accordance with its terms or the law, the insolvent estate may incur liability towards the co-contacting party.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

In case of *faillite*, creditors have to make a declaration of their claims with the secretariat (*greffe*) of the Court. Broadly speaking, the procedure will in practice be the same in the case of *liquidation*

as provided for by the financial sector law, but it is for the Court to fix the rules to be followed. The same is true in *sursis de paiement* proceedings but there the issue appears to be less relevant because of the essentially temporary nature of these proceedings, to be followed by liquidation, except where the company recovers its independence.

The 1935 grand-ducal decree on *gestion contrôlée* does not provide for a special procedure according to which claims are to be made.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

All creditors whose claims compete in the *faillite* constitute the "mass of creditors" ("*masse des créanciers*"). Courts have admitted that this concept of mass of creditors is also applicable in the *gestion contrôlée* procedure.

Creditors who benefit from a first ranking mortgage or pledge are considered "out of the mass" as they may enforce such security and therefore do not compete with the other creditors.

Apart from that, certain claims shall have preferential status, such as: (i) the preferential right of employees as mentioned under question 4.3 above; (ii) certain social security claims; or (iii) claims by the tax authorities.

Generally speaking the above will equally apply in other types of insolvency proceedings.

Where the estate elects to maintain certain contacts or to enter into new contacts after the opening and for the benefit of the insolvency proceedings (such as a lease contract or an employment contract), the claims arising therefrom will rank before any other claims and qualify as "debts of the estate" (*dettes de la masse*) as opposed to "debts in the estate" (*dettes dans la masse*).

5.3 Are tax liabilities incurred during each procedure?

During insolvency proceedings, the company remains an ordinary tax payer. In particular, any profits realised during that period are in principle subject to tax. In practice, however, a bankrupt company should have tax losses available!

6 Ending the Formal Procedure

6.1 Is there a process for "cramming down" creditors who do not approve proposals put forward in these procedures?

The reorganisation plan prepared by the *commissaires* in *gestion contrôlée* proceedings may provide for the waiver of part of the unsecured creditors' claims. If approved by the creditors according to certain majority rules and by the Court, the plan becomes compulsory for all creditors, whether in agreement or not.

For the sake of good order, it should be mentioned that a similar procedure – called "*concordat*" – is incidentally provided for in ordinary *faillite* proceedings. In practice however, it appears to be hardly applied, if at all. We shall therefore not elaborate further thereon.

6.2 What happens at the end of each procedure?

Faillite results in the liquidation and dissolution of the company. Where *gestion contrôlée* proceedings succeed, the company will continue to exist and be able to pursue its business. Otherwise, faillite proceedings will normally be instituted.

Sursis de paiement proceedings, as provided for by the financial sector law, cannot be instituted for a period exceeding six months though it has been decided that in exceptional circumstances, it can be prolonged by the Court. Thereafter, the company will either recover its autonomy or liquidation proceedings be instituted. *Liquidation* proceedings will result in the company being dissolved and in ceasing to exist once the liquidation is closed.

7 Alternative Forms of Restructuring

7.1. Is it common to achieve a restructuring outside a formal procedure in Luxembourg? In what circumstances might this be possible?

It is not common in Luxembourg to achieve a restructuring outside a formal procedure. If a company faces difficulties without the conditions requiring the directors to declare bankruptcy being met, the parties are free to contractually restructure the debt. But no creditor can, in such circumstances, be forced to accept and concur to such restructuring. Informal restructuring is thus a difficult exercise if there is a plurality of creditors. It should, for the sake of good order, be mentioned that articles 1265 ff of the *Code Civil* envisage this type of agreed restructuring but seem hardly, if at all, to be applied in practice.

7.2. Is it possible to reorganise a debtor rather than realise its assets and business?

As is apparent from the answers to previous questions and in particular to question 2.1, *gestion contrôlee* (and *sursis de paiement*) offer a legal framework within which general corporations and certain financial sector entities may be reorganised rather than just having their assets and business realised.

7.3. Is it possible to achieve an expedited restructuring of the debtor by means of a pre-packaged sale? How is such a sale effected?

This type of procedure is not provided for by Luxembourg law.

8 International

8.1 What would be the approach in Luxembourg to recognising a procedure started in another jurisdiction?

Luxembourg law is based on the so-called principle of the "universality" of insolvency proceedings. Accordingly, insolvency proceedings started in another competent jurisdiction will, as a general rule, be automatically recognised in Luxembourg without, in particular, *exequatur* being required.

With regard to proceedings opened in another Member State of the European Union, EC regulation 1346/2000 confirms this traditional approach of Luxembourg law.

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