



Arendt NY Webinar Series

Restructuring & Insolvency of Luxembourg companies from a US perspective

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The speakers



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Agenda

- Introduction
- Top 5 questions raised by clients
 1. What are the main duties of directors in the context of financial difficulties?
 2. When is a Luxembourg company bankrupt and what are the main consequences of a Luxembourg bankruptcy?
 3. Are reorganization proceedings available in Luxembourg?
 4. How could US Chapter 11 proceedings opened in relation to a group with Luxembourg affiliates be recognized in Luxembourg?
 5. How could creditors enforce security interests or netting arrangements in the context of Luxembourg bankruptcy proceedings?
- Q&A

1. What are the main duties of directors in the context of financial difficulties?



1. Main duties of directors

■ Duties

- Company first, shareholders and creditors later
- Evolving duties in the context of financial difficulties
- When the music stops

■ Specific directors' liability issues in case of bankruptcy

- Bankruptcy-related criminal offences
- Prohibition from exercising a mandate or commercial activity
- Action for coverage of liabilities (*action en comblement de passif*)
- Extension of bankruptcy

2. When is a Luxembourg company bankrupt and what are the main consequences of a Luxembourg bankruptcy?



2. a) When is a Luxembourg company bankrupt?

- When it fails:
 - a “liquidity test” (i.e. it is in a state of cessation of payments)

AND

- a “creditworthiness test” (i.e. it can no longer raise credit or obtain payment terms)
- No “balance sheet test”
- Mandatory filing obligation (but suspended in the context of Covid-19)
- Good to know: bankruptcy is a liquidation process



2. b) What are the main consequences?

- Board replaced by a court-appointed receiver
- Individual enforcement actions suspended
 - Exceptions: financial collateral arrangements (e.g. pledges) and netting arrangements
- “Abnormal” transactions may be set aside in certain circumstances
 - During the applicable hardening period
 - Or at any time in case of fraud
- No automatic termination of contracts
 - Exception: *intuitu personae* arrangements
 - Exception: *ipso facto* clauses
- Good to know: limited creditors’ control and unpredictable timing

3. Are reorganization proceedings available in Luxembourg?



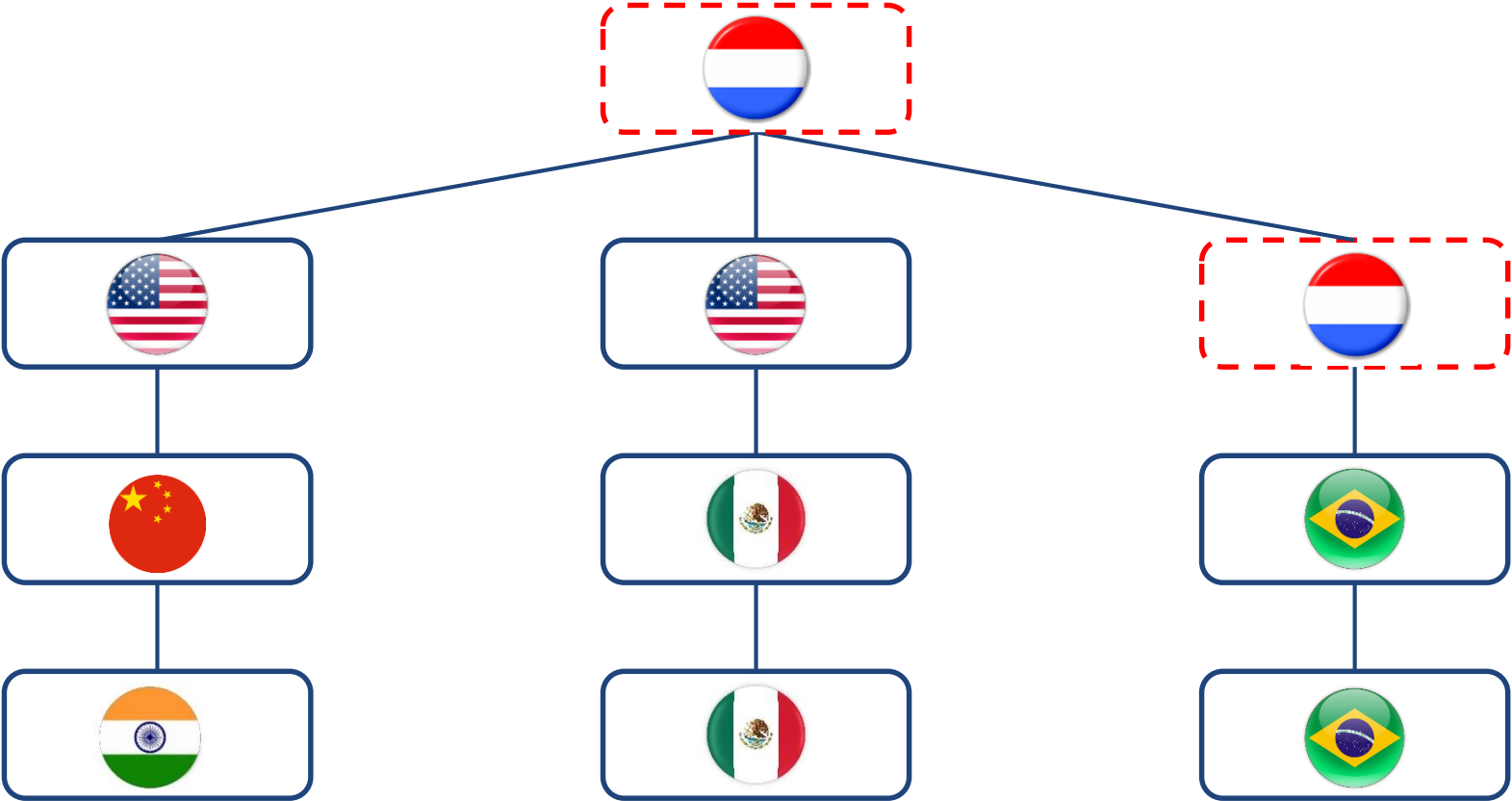
3. Reorganization proceedings

- Current (ineffective) reorganization proceedings
 - Stay of payments, composition with creditors, controlled management
- Reasons for ineffectiveness
 - Conditions to access such proceedings
 - *Ex officio* bankruptcy
 - Company may have closer links to other jurisdictions
- A promising reform is in the works
 - Willingness to favor reorganization over bankruptcy
 - Automatic stay
 - Outcome: extended stay, collective agreement or asset / business transfer
 - Due by mid-2021 at the latest
 - Will implement EU Restructuring Directive

4. How could US Chapter 11 proceedings opened in relation to a group with Luxembourg affiliates be recognized in Luxembourg?



4. US Chapter 11 proceedings?





4. US Chapter 11 proceedings?

■ Jurisdictional principles

- Principle of unity and universalism (applicable in Luxembourg)
- Principle of plurality and territoriality

■ International jurisdiction

- Central administration of the company in Luxembourg
- Exclusive jurisdiction of the Luxembourg court

■ Recognition of foreign bankruptcy judgments



4. US Chapter 11 proceedings

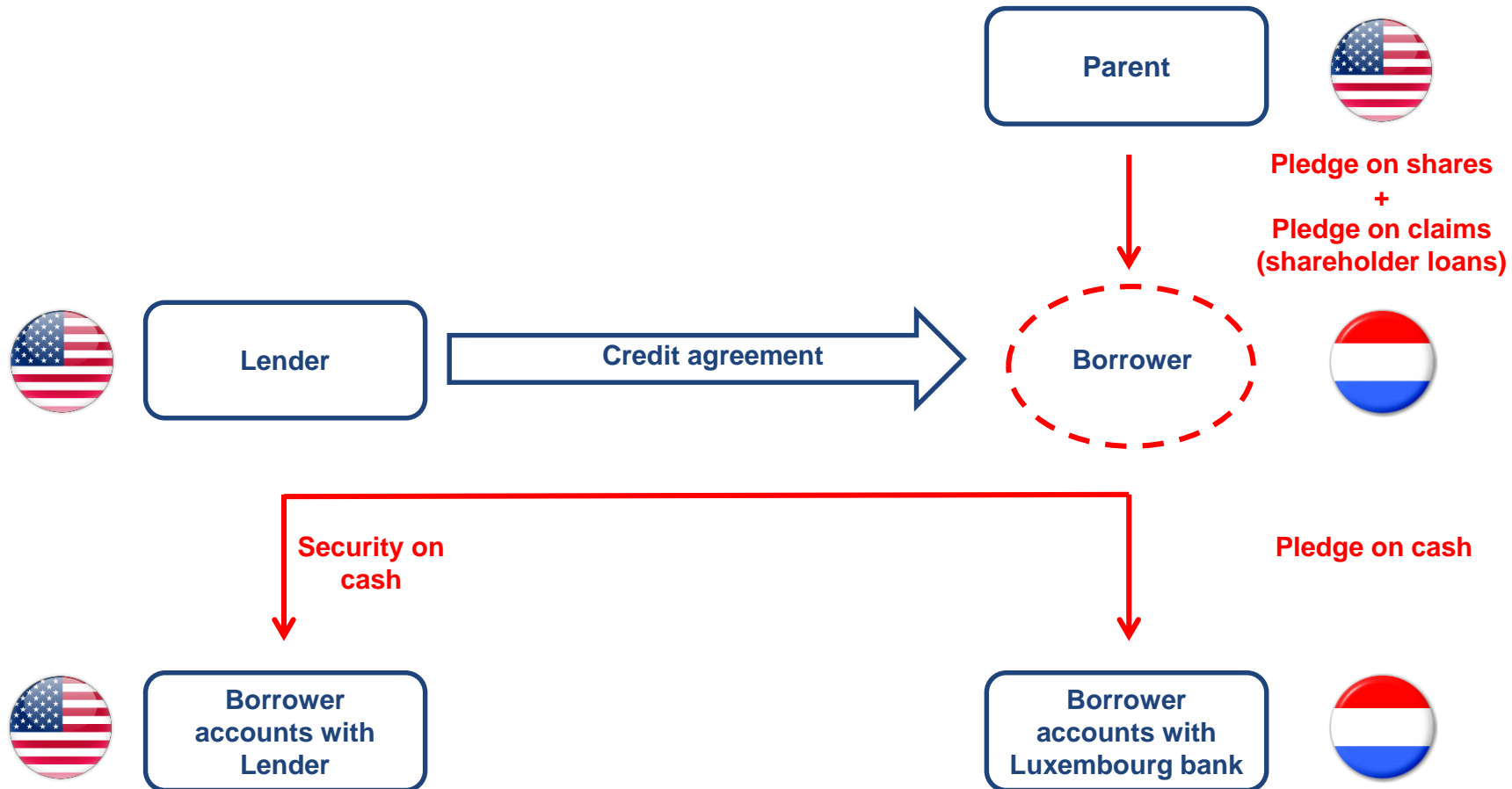
■ Mossi & Ghisolfi (M&G) case

- 2017: filing for US Chapter 11 proceedings
- Delayed project to build new plastic plant in Texas
- DIP financing
- M&G Luxembourg companies requested to be dismissed from US Chapter 11 proceedings
- 2018: Delaware Bankruptcy Court dismissed M&G Luxembourg companies on the grounds that US Chapter 11 proceedings would not be recognized in Luxembourg

5. How could creditors enforce security interests or netting arrangements in the context of Luxembourg bankruptcy proceedings?



5. Enforcement of security interests





5. Enforcement of security interests

- Luxembourg pledges and foreign security interests enforceable notwithstanding reorganization measures, winding-up proceedings or any other similar Luxembourg or foreign proceedings
- Overriding mandatory rule (*loi de police*)
- Enforcement event = an event of default or any event as agreed between the parties [e.g. bankruptcy proceedings] on the occurrence of which, under the terms of a pledge agreement or the relevant financial obligation agreement [e.g. credit agreement] or by operation of law, the pledgee is entitled to realize or appropriate the pledged assets
- No formalities (e.g. notice of enforcement or court approval)

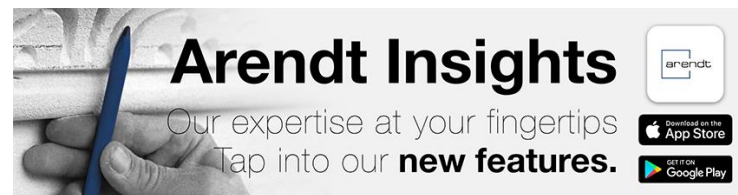


5. Enforcement of security interests

■ Various enforcement methods available

- Appropriation by the pledgee or by a third party designated by the pledgee at the price determined, before or after appropriation, by an agreed upon valuation method (e.g. market value determined by an independent expert); and/or
- Sale in a private transaction at normal commercial conditions; and/or
- Sale by public auction; and/or
- Request from a court that title be assigned or transferred to the pledgee at a price determined by a court appointed expert; and/or
- Instruction to transfer all or part of the pledged assets to the pledgee or to a person designated by the pledgee

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