# THE RESTRUCTURING REVIEW

SIXTEENTH EDITION

**Editor**
Peter K Newman

THE LAWREVIEWS

# THE RESTRUCTURING REVIEW

Sixteenth Edition

**Editor**
Peter K Newman

THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk



ISBN 978-1-80449-191-1

# PREFACE

I am very pleased to present this 16th edition of *The Restructuring Review*. This volume aims to help general counsel, private practice, governmental and academic lawyers, as well as other professionals, investors and market participants to understand the prevailing conditions in the global restructuring market in 2022 and the first half of 2023. This edition seeks to highlight some of the most significant legal and commercial developments and trends during this period.

Two common themes during this period pervade the contributions to this edition by leading practitioners from jurisdictions around the globe. First, a wide-spread economic slowdown, which started at the beginning of 2022 and has continued well into 2023 and appears likely to persist for some time. In the past year, most jurisdictions saw tightening in credit markets and increases in interest rates aimed at combating inflation that has taken hold while the covid-19 pandemic state-support measures were phased out. Those state support measures and a sustained period of access to cheap capital mitigated much of the damage wrought by the covid-19 pandemic on businesses and had resulted in positive economic growth and limited restructuring and insolvency activity throughout the pandemic and immediately after. Additionally, a number of geopolitical and other factors have materially slowed growth, with most jurisdictions seeing an increase in insolvency filings and restructuring activity during 2022. Second, this period has witnessed the continued development of restructuring tools to ameliorate and resolve insolvency and financial distress, with numerous jurisdictions introducing additional legislative reforms to facilitate restructurings or 'road-testing' and developing tools introduced in recent years.

Economies around the globe continue to face challenges to post-pandemic economic recovery including disruptions in global supply chains and historic levels of inflation and rising interest rates. An increased focus on environmental, social and governance concerns and metrics is also leading to changes in the corporate and investment landscape – changes to which businesses must adapt while juggling their operational demands. In addition, the war in Ukraine, which commenced with the Russian invasion in February 2022 and continues at the time of writing, has ushered in soaring energy costs, exacerbated supply chain issues, and been met with a punishing and ever-changing regime of economic sanctions from the European Union, United Kingdom and United States. Many companies have struggled to manage rising costs and interest rates, resulting in an increasing number of companies commencing insolvency proceedings, with some of the hardest hit industries in many jurisdictions being real estate, construction and hospitality. Although global inflation levels show signs of beginning to ease in the first half of 2023 as the impact of high interest rates begins to show, heightened costs of goods, services and energy persist, as does the war in Ukraine, and companies continue to face uncertainty on many fronts.

As a slight silver lining to the grey cloud of the current economic climate around the world, the increase in insolvency and restructuring activity allows further development and testing of the many jurisdictions that have in recent years put in place new or updated laws, rules and practices relating to business restructuring and insolvency. As you will see in the coming chapters, many of these new laws are being used on a regular basis, helping businesses to restructure in an exceptionally challenging time. This continued development means that corporate debtors and their advisers will have increasingly robust toolkits to deal with financial distress and insolvency arising in the turbulent post-pandemic environment.

I hope that this edition of *The Restructuring Review* will continue to serve as a useful guide at a crucial moment in the evolution of restructuring and insolvency law and practice internationally. I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom it would not have been possible.

**Peter K Newman**
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
July 2023

**Chapter 14**

# LUXEMBOURG

*Clara Mara-Marhuenda, Sébastien Binard and Grégory Minne*[1]

## I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

Situated at the crossroads between Belgium, France and Germany, Luxembourg is a highly stable country and has registered relatively consistent growth rates in recent years. Nonetheless, with record highs of inflation in 2022 and a significant decrease of private consumption and financial investments, gross domestic product (GDP) growth in 2022 only amounted to 1.5 per cent[2] compared to 7 per cent in 2021 and 3.1 per cent in 2020.[3] The impact of the covid-19 pandemic on GDP growth in 2020 and 2021 was therefore smaller than experts had initially predicted. Among the countries of the eurozone and the European Union, Luxembourg is considered to be one of the countries to have best managed the crisis.[4] GDP growth in 2023 is expected to reach 1.6 per cent. It is projected to recover in 2024 with 2.4 per cent.[5]

In Luxembourg, bankruptcy proceedings are currently the most common insolvency proceedings, whereas reorganisation proceedings remain rarely used in practice or are often used too late to avoid bankruptcy. However, a substantial reform of Luxembourg insolvency law is under way (see Section VI.ii).

In 2022, 1050 bankruptcy judgments were rendered by the Luxembourg courts.[6] The number of bankruptcy proceedings in 2022 was therefore lower compared to both 2021 and 2020 with a total of 1,181 judgments and 1,158 judgments.[7]

Compared to the previous year, more bankrupcty judgments were rendered in 2022 with respect to the hotel industry and restaurant sector.[8] Regarding holding companies and investment funds, a decrease in bankruptcies of about 15 per cent can be noted for the year 2022. However, in Luxembourg, any commercial company that is in cessation of payments (i.e., unpaid debts of the debtor are certain, liquid, due and payable) must make a bankruptcy

---

1 Clara Mara-Marhuenda, Sébastien Binard and Grégory Minne are partners at Arendt & Medernach. The authors would like to thank Linda Goedert, supervising associate in the dispute resolution practice at Arendt & Medernach, for her valuable contribution when updating this chapter.

2 European Commission, Economy and Finance, Economic Forecast for Luxembourg, 15 May 2023

3 National Institute of Statistics and Economics studies, Statec, www.statistiques.public.lu, Macroeconomic forecast 2022–2026.

4 National Institute of Statistics and Economics studies, Statec, www.statistiques.public.lu, Macroeconomic forecast 1995–2021.

5 European Commission, Economy and Finance, Economic Forecast for Luxembourg, 15 May 2023.

6 www.statistiques.lu, 1050 bankruptcies and 846 liquidations in 2022, 12 January 2023.

7 2020 Ministry of Justice annual activity report, Government of the Grand Duchy of Luxembourg, Part II – Activity reports from the courts and the public prosecutors' offices, pp. 126 and 182.

8 www.statistiques.lu, 1050 bankruptcies and 846 liquidations in 2022, 12 January 2023.

filing within one month.[9] This one-month period was suspended until 30 June 2022.[10] As a consequence, many potential bankruptcy cases had not been filed in 2021 and during the first half of 2022, which is why the above figures may provide a misleading picture of the situation in those particular years.[11] During the covid-19 pandemic, an extensive range of support measures was been put in place for Luxembourg businesses.

During the first six months of 2023, approximately 814 bankruptcy proceedings were opened by the Luxembourg District Courts.[12] According to the Ministry of Finance, the sectors most affected during these first months of the year are first and foremost the construction sector, but also the trade and catering sectors.[13] Over the past few years, the sector most affected by the high bankruptcy ratio remains the services sector.[14] These figures reflect the structure of Luxembourg's economy, which is still led by the banking and financial sector. Around 150 credit institutions are established in Luxembourg. Some multinational companies, such as ArcelorMittal, Goodyear, DuPont, SES and Ferrero, have chosen to successfully establish their European headquarters in Luxembourg. In recent years, multinational companies active in the high-tech and e-commerce industries have also decided to set up their European or international headquarters in Luxembourg.

Regarding Luxembourg reorganisation proceedings, few were opened since 2019. Only three controlled management proceedings were opened in 2019, and two were followed by a bankruptcy proceeding.[15] No controlled management proceedings were opened in 2020, 2021 or 2022. One stay of payments has been granted by the Luxembourg Courts in December 2022.[16]

After the 2007 to 2008 financial crisis, proceedings were opened against several credit institutions with established holding companies, subsidiaries or branches in Luxembourg, including, among others, some Icelandic banks (Kaupthing, Glitnir Bank and Landsbanki), as well as Lehman Brothers, Espírito Santo and ABLV.

9 See Section II.i.

10 Law of 17 December 2021, amending the law of 19 December 2020 on the temporary adaptation of certain procedural provisions in civil and commercial matters, as amended.

11 Chamber of Commerce Luxembourg, Creditreform, Fewer bankruptcies in Luxembourg, 27 July 2022.

12 Luxembourg Business Register, Statistics.

13 The Statistics Portal, Bankruptcies and liquidations on the rise in the 1st quarter of 2023, 19 April 2023. Delano, Nearly 600 companies in bankruptcies or liquidation at beginning of the year, 19 April 2023.

14 *Le Quotidien*, 14 January 2020 quoting an analysis made by Creditreform.

15 2020 Ministry of Justice annual activity report, Government of the Grand Duchy of Luxembourg, Part II – Activity reports from the courts and the public prosecutors' offices, pp. 128 and 183.

16 See Section II.i.

## II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

The Luxembourg legislative framework makes a distinction between proceedings involving the winding up of the debtor (bankruptcy proceedings)[17] and proceedings aiming at the reorganisation of the debtor (controlled management,[18] composition with creditors to avoid bankruptcy[19] and stay of payments).[20]

Of the above, controlled management is the most used reorganisation proceeding. Stay of payments and composition with creditors have rarely been used successfully in recent decades.

It must be added that specific insolvency regimes govern credit institutions, insurance undertakings and investment funds, for example:

*a* the amended law of 18 December 2015 on the resolution, reorganisation and winding-up measures of credit institutions and certain investment firms;
*b* the amended law of 7 December 2015 on the insurance sector;
*c* the amended law of 17 December 2010 relating to undertakings for collective investment;
*d* the amended law of 13 February 2007 on specialised investment funds;
*e* the amended law of 12 July 2013 on alternative investment fund managers;
*f* the law of 23 July 2016 on reserved alternative investment funds; and
*g* the amended law of 15 June 2004 relating to the investment company in risk capital.

### i Winding-up proceedings

#### *Bankruptcy*

*Conditions for opening*

Debtors that carry out commercial activities and that make a profession out of these activities may be declared bankrupt.

Two conditions must be met cumulatively for a trader to be considered bankrupt:[21] (1) it can no longer pay debts as they fall due (i.e., it is in a situation known as cessation of payments) and (2) it is no longer being granted credit.[22]

The cessation of payments means the debtor is unable to meet its commitments.[23] It implies that unpaid debts are certain, liquid and have fallen due on the day on which the bankruptcy judgment is delivered.[24] It is not necessary that the debtor has ceased all its payments. The only relevant issue is to establish whether the default in payment to certain creditors is temporary or permanent. In the latter case, the existence of a single debt may lead to the cessation of payments.[25] Conversely, temporary financial difficulties would not be sufficient.[26]

17 Articles 437 ff. of the Commercial Code.
18 Grand Ducal Decree of 24 May 1935 on controlled management.
19 Law of 14 April 1886 on composition with creditors, as amended.
20 Articles 593 ff. of the Commercial Code.
21 This chapter focuses on insolvency proceedings related to commercial companies.
22 Article 437 of the Commercial Code.
23 Novelles, Droit commercial, T.IV, No. 203, p. 72.
24 Court of Appeal, 5 December 2012, Docket No. 38410.
25 District Court of Luxembourg, 14 May 2004, Docket No. 75935.
26 Court of Appeal, 20 February 1934, Pas. 13, p. 268.

The loss of creditworthiness may result from the inability to raise credit or from the creditors' refusal to accept any further delay in paying back the debt.[27]

*Procedure*

The district court with jurisdiction may declare the debtor bankrupt (1) on request of one or more creditors, (2) on request by the public prosecutor, (3) on a declaration of the cessation of payment by the debtor itself or (4) *ex officio* by the court.

The proceeding is carried out by a receiver under the supervision of a bankruptcy judge, who are both appointed in the bankruptcy judgment. The receiver will have the judgment published in summary in the newspapers designated by the court.

The receiver represents both the debtor and the body of creditors.

The receiver prepares an inventory of all of the debtor's assets. If it appears that the assets are insufficient to cover the costs of the bankruptcy proceeding, the court may, on request of the receiver, decide to end the proceeding immediately.

All creditors must lodge a proof of their claim with the district court. The receiver decides together with the bankruptcy judge whether or not the declared claims should be accepted. Creditors whose claims have been rejected may refer to the district court for judgment.

All assets of the debtor are realised either by private contract or by public auction, as ordered by the court. The receiver seeks to obtain payment of all outstanding claims of the debtor.

The receiver administers and realises the debtor's assets and distributes the proceeds among the creditors on the basis of their rank and after the administrative costs and fees of the receiver have been paid.

After all proceeds have been distributed among the creditors, the receiver submits a detailed report about the bankruptcy proceeding.

*Effects*

Upon the bankruptcy judgment, the debtor is no longer entitled to administer its assets or dispose of them. Any legal actions taken by unsecured creditors against the debtor are suspended. Certain preferential creditors are allowed to continue the proceedings they have initiated. Creditors benefiting from financial collateral arrangements or set-off and netting arrangements may exercise their rights (see Section II.iv).

The district court determines a hardening period (or suspect period), which covers the situation whereby the debtor, before having been declared bankrupt, was unable to meet its financial obligations and during which 'abnormal' transactions performed by the debtor may be declared void. Such clawback actions are discussed below. In practice, the district court usually sets the hardening period to the legal maximum of six months prior to the bankruptcy judgment.

Agreements entered into by the debtor are not automatically terminated, with the exception of *intuitu personae* agreements,[28] employment agreements and those including an insolvency termination clause. Generally, any business activity of the debtor is stopped, but in certain cases the receiver may decide to continue the business temporarily.

27 Court of Appeal, 12 November 2014, Pas. 37, p. 340.

28 Court of Appeal, 18 May 2011, Docket No. 35516.

After bankruptcy proceedings have started, the debtor can propose a composition to its creditors. Proposals of composition after bankruptcy proceedings have started are, however, exceptional.

### ii Reorganisation proceedings

#### *Composition with creditors to avoid bankruptcy*

*Conditions*

Composition with creditors is a protective measure that allows debtors in financial difficulties to avoid the declaration of bankruptcy through the approval by the district court of an arrangement with its creditors for the settlement of their claims. As in bankruptcy matters, companies may benefit from the composition with creditors proceedings, provided that they are considered to be acting in good faith and unfortunate.

*Procedure*

The debtor files the request before the district court with jurisdiction. The petition contains, among other things, (1) a description of the events that have led to the financial difficulties; (2) a detailed evaluation of the debtor's assets; (3) a list indicating the names of its acknowledged or alleged creditors, their address and the amount of their claims; and (4) the composition proposal.

Subject to the request's admissibility, the district court appoints a delegated judge to establish a report of the situation of the debtor. However, should the court consider that the procedure is hopeless, it may order the bankruptcy *ex officio*. If the court approves the composition proposal, it sets a date for a meeting of creditors. The debtor must deposit a sum to cover the costs to be incurred for the publication of the notice to attend the meeting of creditors.

At the meeting of creditors, the delegated judge reports on the state of the affairs of the debtor and the debtor proposes an arrangement to its creditors. The composition can be approved only with the approval of the majority of the creditors (representing 75 per cent of the total claims accepted definitely or provisionally). Creditors whose claims are secured by a lien, pledge or mortgage are not entitled to vote with regard to their claims unless they waive their lien, pledge or mortgage. Following the meeting with creditors, the court convenes a hearing for the final approval of the arrangement.

The judgment approving the composition (or not) is issued and, within three days, it is posted in the auditorium of the court and published in summary form in the designated newspapers.

*Effects*

Once approved, all enforcement measures are temporarily suspended subject to financial collateral arrangements and set-off and netting arrangements (see Section II.iv). The arrangement is binding on all creditors but applies only to liabilities incurred or commitments made before such an arrangement.

An appeal or objection by the creditors or the debtor against the judgment approving the composition (or not) has no suspensive effect.

***Stay of payments***

*Conditions*

Stay of payments may be granted to a debtor who has suffered temporary liquidity problems, allowing it to suspend payments to creditors for a given period of time. It may be granted either (1) if the debtor, as a result of exceptional and unforeseen events, has to temporarily cease its payments but the verification of the balance sheet shows that it has sufficient assets or income to satisfy the creditors in principal or interest or (2) if the debtor is currently in deficit but there are strong indications that it may rebalance its assets and liabilities (i.e., return to solvency).

*Procedure*

The request, accompanied by a description of the events on which the request is based, a list of the creditors, and a detailed estimate of the debtor's assets and liabilities, is filed by the debtor simultaneously before the district court and the Supreme Court.

The district court appoints one or more experts to examine the affairs of the debtor and a judge to supervise the operations.

The judge will hand down their report in the presence of the creditors convened on the date (within 15 days of the request) set by the president of the district court. On this date, the creditors are heard, they declare the amount of their claims, and they decide whether they approve or reject the request for stay of payments.

The stay of payments may be granted only with the approval of the majority of creditors representing three-quarters of the aggregate debt.

After the meeting of the creditors, the district court hands down its opinion, which is transmitted, together with the relevant documents, to the attorney general of the Supreme Court.

The Supreme Court hands down its decision within eight days. If the Supreme Court grants a stay of payments, it determines its duration and appoints one or more commissioners.

*Effects*

The management body of the debtor stays in place during the stay of payments but acts under the supervision of a commissioner. The creditors' rights are suspended for the duration of the proceeding, subject to financial collateral arrangements and set-off and netting arrangements (see Section II.iv). The stay of payments applies only to the commitments entered into before such a stay of payments was granted.

***Controlled management***

*Conditions*

A company that either (1) is not able to raise additional credit or (2) has difficulties meeting its commitments may apply to the district court for an order for controlled management, under which the management of the debtor is placed under the control of one or more commissioners designated by the court. A debtor cannot avail itself of the controlled management regime if it is already considered bankrupt (i.e., if the two conditions for bankruptcy referred to above are met).

*Procedure*

The application for controlled management, accompanied by a list of the creditors and evidence that the prospects for reorganisation (or orderly liquidation) are realistic, is filed *ex parte* by the debtor before the district court. Only the debtor has standing to seek controlled management, and such a proceeding may not be initiated by a third party (e.g., a creditor or a shareholder).

The purpose of controlled management is to allow either a reorganisation or an orderly winding up of the debtor through the realisation and distribution of its assets.

Upon the filing of the application, unless the financial situation of the debtor appears to be hopeless, the district court issues a first judgment including the appointment of a delegated judge to examine the debtor's affairs and to report to the court. If the debtor's prospects for reorganisation (or orderly liquidation) are not realistic, bankruptcy will be the only alternative.

If the court comes to the conclusion that a reorganisation (or orderly liquidation) is possible, it will grant the application for controlled management and appoint one or more commissioners, who must submit a reorganisation plan or a plan regarding the realisation and distribution of the debtor's assets.

The judgment of the court is issued from the delegated judge's report after having heard the debtor (excluding the creditors). The court's judgment will be published in summary form for the information of all creditors.

The commissioners will report to the court and submit a reorganisation (or a liquidation) plan, depending on the financial capacities of the debtor. The plan shall determine: (1) whether unsecured creditors' claims will be paid in full or in part, with or without further rescheduling; and (2) whether interest accruing after the date of the judgment delegating a judge or the controlled management decree will be due.

The content of the commissioners' proposal is individually notified to the debtor's creditors and also published by extract on RESA, Luxembourg's central electronic platform for official publications.

The creditors shall vote within 15 days of the notification and the publication on the reorganisation or liquidation plan, which, upon approval of a majority of creditors representing more than half of the debtor's aggregate debt, and the court's consent, will be binding on the debtor and all creditors. The debtor or its creditors may appeal against the court's judgment to accept or reject the plan agreed to by a majority of the creditors. The court's judgment approving the plan is, however, provisionally enforceable pending the outcome of the proceedings in the Court of Appeal.

Creditors may submit observations to the court before it takes its decision to accept or reject the plan. Creditors abstaining from the vote are deemed to have voted in favour.

Once the plan has received final approval, its content is applicable and binding on the debtor and all its creditors, whether or not they are in agreement. If, however, the plan is rejected by the creditors or by the court, the court either pronounces bankruptcy or allots further time to the commissioner for the submission of an alternative plan.

All debts of the debtor originating before the date of designation of a delegated judge by the first judgment of the district court are taken into consideration. Further debts, duly authorised by the judge and, afterwards, by the commissioner, that are incurred during the mission of the delegated judge and of the commissioner, may also be taken into consideration in the plan.

If the plan is approved by the creditors and the court, the debtor in principle regains control over its affairs. Otherwise, bankruptcy proceedings will normally be instituted.

*Effects*

The commissioner does not replace the debtor's management but supervises it. The decisions taken by the debtor's management must be approved by the commissioner or should be otherwise voidable. In addition, the commissioner may initiate proceedings to void any 'abnormal' transactions (such as preferential payments) made by the debtor within a period of up to six months and 10 days prior to the application for controlled management. They may also initiate liability actions for mismanagement against the directors.

As from the court's judgment, enforcement rights of the creditors against the debtor's assets are suspended (subject to financial collateral arrangements and set-off and netting arrangements (see Section II.iv) and any voluntary payments from the debtor require the prior authorisation of the delegated judge.

Subject to the foregoing, creditors' enforcement rights remain suspended for the duration of the controlled management. Depending on the wording of the court's judgment, they might have to submit their proof of claim.

### iii Informal (out-of-court) restructuring

There is currently no legal framework in Luxembourg for an out-of-court debt restructuring such as standstill, debt rescheduling, new money financing, debt-to-equity conversion or takeover of debtor by creditors. However, debtors may enter into out-of-court arrangements with their creditors.

### iv Specific topics

***Taking and enforcing financial collateral, set-off and netting***

The amended law of 5 August 2005 on financial collateral arrangements (the Collateral Law), implementing Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, provides exceptional protection to collateral takers in the case of reorganisation or winding up of the collateral giver. In substance, when a financial collateral arrangement (i.e., pledge agreement, transfer of title for security purposes agreement, repurchase agreement or fiduciary transfer agreement) is subject to the Collateral Law, Luxembourg law insolvency provisions (when the collateral giver is in Luxembourg) or foreign law insolvency provisions (where the collateral giver is not in Luxembourg) are not applicable, thus enabling the collateral taker to enforce its rights, notwithstanding the reorganisation or winding up of the collateral giver.[29]

Under the Collateral Law, set-off and netting arrangements (under which the parties agree to set off their mutual obligations) in respect of claims or financial instruments are also enforceable, notwithstanding the existence of Luxembourg or foreign reorganisation or winding-up proceedings initiated against the defaulting party.

Finally, the Collateral Law provides that provisions governing Luxembourg reorganisation or winding-up proceedings are inapplicable when the collateral provider

29 Article 20(4) of the Collateral Law.

that is party to a financial collateral arrangement governed by Luxembourg law or a similar collateral arrangement governed by a foreign law, or when the defaulting party to netting and set-off arrangements governed by a foreign law, is established or resides in Luxembourg.[30]

### *Duties of directors of companies in financial difficulties*

*General principle*

As a general principle, the directors of a Luxembourg company are not liable for the debts incurred by that company.[31] However, the directors' general duty is to perform their duties in the best interests of the company, and they may be held liable if they failed to act in a prudent and diligent way and caused damages to the company (contractual liability) or to third parties (tort liability). In cases of bankruptcy, the receiver, who represents both the company and the body of creditors, may initiate liability actions against the directors.[32]

*Specific provisions*

The amended law of 10 August 1915 on commercial companies (the Companies Law) includes specific provisions on the duties of directors of Luxembourg companies in financial difficulties.

If, as a result of a loss, the net assets of a company are reduced to an amount that is less than half of its share capital, the board of directors shall convene a shareholders' general meeting to deliberate on the possible dissolution of the company.[33] In the event of a breach of this provision, the directors may be declared personally jointly and severally liable towards the company for all or part of the increase in the loss.

The Companies Law provides for specific criminal offences, such as the failure to publish the balance sheets and compulsory reports[34] or the payment of fictitious dividends.[35]

The main legal provisions dealing with the personal liabilities of directors in cases of bankruptcy are laid down in the Commercial Code.

The directors must file for bankruptcy within one month of the date that the company ceased its payments.[36] Failing that, they may be criminally liable for negligent or fraudulent bankruptcy.[37]

If a director has contributed by a serious offence to the bankruptcy of the company, the court may declare that such a director shall be prohibited from exercising directly or indirectly any commercial activity, as well as any function of director, manager, auditor or any function implying the power to undertake obligations on behalf of a company.[38]

30 Article 24 of the Collateral Law.

31 Article 441-8 of the Companies Law.

32 Article 441-9 Section 1 of the Companies Law provides for the personal and individual liability of a director towards the company for management errors. Article 441-9, Section 2 provides that a director shall be liable to the company and third parties in the event that the company or third parties suffer a loss as a result of a breach of either the law on commercial companies or the company's articles of incorporation.

33 Article 480-2 of the Companies Law, applicable only to public limited companies and partnerships limited by shares.

34 Article 1500-2 of the Companies Law.

35 Article 1500-6 of the Companies Law.

36 Article 440 of the Commercial Code.

37 Articles 573 ff. of the Commercial Code.

38 Article 444-1 of the Commercial Code.

Any director may be declared personally bankrupt in cases of bankruptcy of a company if they have used the company to act in their own personal interest; have used the company's assets as if they were their own; or have carried on, in their own personal interest, any loss-making activity that would inevitably lead the company into bankruptcy.[39] It makes no difference whether the director has been lawfully appointed by the company or has acted in such a capacity.

The court may decide that the directors of a company are liable for the outstanding debts of that company if gross negligence by the directors has contributed to the bankruptcy, and if the assets of the company do not allow the payment of all the company's creditors. Such gross negligence is appreciated *in concreto* by the court.

The same liability applies in cases in which one or several directors have misused their authority to continue any loss-making activity of the company for their own personal benefit and without taking reasonable measures to avoid bankruptcy.

The above rule not only applies to directors who are in office at the moment the company is declared bankrupt but also may apply to any directors who have in the past contributed to the bankruptcy through their actions and to lawfully appointed or to de facto directors.

*Clawback actions*

Any payments made or transactions concluded by the management of the debtor, but not by the receiver, during the bankruptcy proceedings are null and void.

Moreover, the Commercial Code provides for specific rules applicable to transactions entered into by a debtor that has been declared bankrupt during the hardening period or made to defraud the rights of creditors, regardless of the hardening period. These rules do not apply to financial collateral arrangements and set-off and netting agreements subject to the Collateral Law.

*Transactions concluded during the hardening period*

Without prejudice to the arrangements subject to the Collateral Law, the following transactions are automatically null and void if concluded by the debtor during the hardening period or during the 10 days preceding the hardening period: any transaction pertaining to the transfer of assets without consideration, or if the consideration received by the debtor is notably insufficient; any payment made in respect of debts that have not yet matured; any payment made by any other means than cash or trade bills in respect of matured debts; the creation of any contractual or judicial mortgage; and the granting of any pledge on any asset of the debtor to secure pre-existing debts.[40]

Any other payment made by the debtor for any matured debt and any transaction for consideration entered into during the hardening period may be declared null and void if the counterparty of the debtor had due knowledge of the fact that such a debtor was in cessation of payments at that time.[41]

The action seeking a declaration of invalidity or annulment of a transaction by the court may be brought only by the receiver, who represents the body of creditors.[42]

39 Article 495 of the Commercial Code.

40 Article 445 of the Commercial Code.

41 Article 446 of the Commercial Code.

42 Luxembourg District Court, 28 May 1925, Pas. 11, p. 206.

*Transactions made in violation of the rights of creditors, regardless of the hardening period*

Without prejudice to the arrangements subject to the Collateral Law, any transaction or payment made to defraud the rights of the creditors of a debtor is null and void, irrespective of the date on which it occurs.[43]

The receiver may challenge any fraudulent payments and transactions made prior to the bankruptcy, regardless of the hardening period, subject to proof that the creditors suffered a loss and that the transaction was made by the debtor to defraud the rights of its creditors.

## III RECENT LEGAL DEVELOPMENTS

The amended law of 18 December 2015 on the resolution, reorganisation and winding-up measures of credit institutions and certain investment firms and on deposit guarantee and investor compensation schemes implements into Luxembourg law Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

The law provides for measures for early intervention and the resolution of credit institutions and some investment firms, on either an individual or a group basis, and designates the Luxembourg financial regulator (i.e., CSSF) as the resolution authority for Luxembourg. The main resolution tools granted to the resolution council are (1) the sale of businesses by competent authorities without shareholder consent, (2) the creation of a bridge institution, (3) an asset segregation allowing for a transfer of toxic assets to a 'bad institution' and (4) a bail-in.

The law also provides for the reorganisation and winding up of credit institutions, investment firms and other professionals of the financial sector.

## IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

As is set out in Section I, 2022 did not see an increase in the number of bankruptcies in comparison with 2021, although this observation must be linked to the aforementioned postponement of certain time periods in relation to the covid-19 pandemic, which were in force until 30 June 2022. Despite a decrease in the number of bankrupcty judgments rendered, the main economic sectors affected by bankruptcies in the past year were the construction, trade and catering sectors. However, in 2022, bankrupcty judgments with respect to trade and specialised, scientific and technical activities have dropped significantly.[44] In September 2016, Telecom Luxembourg Private Operator was placed under controlled management and avoided bankruptcy through its acquisition by the French NomoTech Group via its Luxembourg subsidiary LuxNetwork SA.[45] In May 2020, Luxembourg-based company Intelsat SA, listed with the New York Stock Exchange, filed a Chapter 11 application with

43 Article 448 of the Commercial Code.

44 www.statistiques.lu, 1050 bankruptcies and 846 liquidations in 2022, 12 January 2023.

45 www.wort.lu, 17 November 2016; www.paperjam.lu, 29 December 2016.

the US Bankruptcy Court for the Eastern District of Virginia.[46] In February 2021, Intelsat SA announced that it had obtained 'the support of key creditor constituencies on the terms of a comprehensive financial restructuring that would reduce the company's debt by more than half – from nearly $15 billion to $7 billion'.[47] Although, in February 2021, Intelsat announced that it had obtained the support of creditors holding approximately US$3.8 billion of the company's funded debt,[48] it struggled for a long time to obtain the support of a group of creditors claiming that Intelsat's proposed restructuring strategy improperly benefits other stakeholders at the group's expense.[49] However, after successful negotiations, Intelsat successfully emerged from its Chapter 11 proceedings in February 2022 as a private company with a substantially strengthened capital structure.[50] We understand that Intelsat intends to ask the competent US bankruptcy court for additional time to file a Chapter 11 plan.[51]

In December 2020, Swissport completed a comprehensive financial restructuring as the ownership of the company has been transferred from HNA Group to a group of global financial investors.[52] In August 2020, the committee of senior secured creditors of Swissport agreed to provide €300 million of bridge financing to give Swissport sufficient and immediate liquidity to trade through the covid-19 market crisis and to facilitate the agreed financial restructuring.[53] Luxembourg law has played an essential role in the Swissport transaction, as Swissport has significantly strengthened its balance sheet and liquidity position with a total debt reduction of approximately €1.9 billion and a new term loan secured by Luxembourg law-governed financial collateral arrangements granting the senior creditors considerable protection in case of reorganisation or liquidation procedures.

## V INTERNATIONAL

In the context of cross-border insolvency proceedings, Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the New Insolvency Regulation) applies to insolvency proceedings opened as from 26 June 2017.

The New Insolvency Regulation replaces Regulation 1346/2000 of the Council of 29 May 2000 on insolvency proceedings (the Old Insolvency Regulation) as from 26 June 2017. The Old Insolvency Regulation continues to apply to insolvency proceedings that were opened before 26 June 2017.

46 *Global Restructuring Review*, K Karadelis, Satellite operator restructures ahead of 5G spectrum sale, 14 May 2020.

47 Intelsat, Intelsat Files Plan of Reorganization with the Support of Key Creditor Groups, 12 February 2021.

48 Delano, Intelsat Pitches Plan to Halve Debt, 15 February 2021.

49 Reuters, M. Chutchian, A year into bankruptcy, Intelsat faces creditor effort to seize control of restructuring, 10 April 2021.

50 https://www.intelsat.com/newsroom/intelsat-announces-successful-emergence-from-financial-restructuring-process/.

51 ibid.

52 Aviation Pros, Swissport Completes Financial Restructuring, 22 December 2020.

53 Swissport, Media Release, Swissport Agrees Comprehensive Restructuring, 31 August 2020.

Without going so far as to completely change legislation that has already proved its worth, the New Insolvency Regulation contains substantial innovations intended to make up for the deficiencies of the Old Insolvency Regulation and to take into account the development of international insolvency law.[54]

As with the Old Insolvency Regulation, the New Insolvency Regulation defines a legal framework for cross-border insolvency proceedings as it governs, in particular, issues linked to jurisdictional competence, the recognition of insolvency proceedings and applicable law.

The New Insolvency Regulation also takes into account recent developments in the domain of insolvency by introducing substantial innovations, such as the extension of the scope of the rules to proceedings intended to rescue distressed debtors, the clarification of the notion of centre of main interests and the measures intended to combat forum shopping, the strengthening of relations between the main proceedings and secondary proceedings, the improvement of the treatment of creditors and the establishment of a regime for the treatment of the insolvency of groups of companies.[55]

The Luxembourg insolvency proceedings referred to in the New Insolvency Regulation are as follows:

*a* bankruptcy proceedings;
*b* controlled management;
*c* composition with creditors;
*d* special winding-up regime applicable to notaries; and
*e* procedures applicable to collective debt settlement in the context of over-indebtedness.

Stay of payments is excluded from the above list of Luxembourg insolvency proceedings.

## VI FUTURE DEVELOPMENTS

### i Directive

Recently adopted Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (on restructuring and insolvency) aims to reduce significant barriers to the free flow of capital stemming from differences in the restructuring and insolvency frameworks of the Member States that should have in place key principles on effective restructuring and second chance frameworks, and measures to make insolvency proceedings more efficient by reducing their length and associated costs and improving their quality.

Two years were given to the Member States to adopt the proposed rescue tools into their own laws, but we understand that Luxembourg, pursuant to the terms of Article 34(2) of Directive (EU) 2019/1023,[56] requested an extension of the implementation deadline of

54 G Minne/F Fayot, The main innovations of the new regulation on insolvency proceedings, JDE, January 2016, p. 2 ff.

55 ibid.

56 '2. By way of derogation from paragraph 1, Member States that encounter particular difficulties in implementing this Directive shall be able to benefit from an extension of a maximum of one year of the implementation period provided for in paragraph 1. Member States shall notify to the Commission the need to make use of this option to extend the implementation period by 17 January 2021'.

one year (i.e., Luxembourg was expected to have implemented Directive (EU) 2019/1023 by 17 July 2022).[57] While the Luxembourg legislator has not been able to meet the July 2022 deadline, one can be hopeful that certain provisions of Directive (EU) 2019/1023 will be implemented over the course of 2023.[58]

### ii Future insolvency reform

A reform of insolvency legislation is currently in progress as a result of Draft Bill No. 6539 on business preservation and modernisation of bankruptcy law, dated 26 February 2013 (the Draft Bill). In December 2019, the Council of State considered that Draft Bill No. 6539 could also effectively implement the aforementioned Directive 2019/1023.[59] The Draft Bill was recently split into two parts, Draft Bill No. 6539A and Draft Bill No. 6539B. Draft Bill No. 6539A mainly includes all parts of the original Draft Bill, except those relating to the administrative procedure for dissolution without liquidation of companies. Draft Bill No. 6539A particularly includes the different procedures for the reorganisation or restructuring of companies. The adoption of Draft Bill No. 6539A, and thus at least the partial implementation of Directive (EU) 2019/1023, is still planned for this year. The Draft Bill intends to provide new tools to distressed companies, its main objectives being the preservation of companies' activities and the protection of the various stakeholders by favouring reorganisations over liquidations.[60]

The Draft Bill distinguishes between court restructuring[61] and out-of-court restructuring[62] and is built around four guiding principles: a preventive aspect, a restorative aspect, a repressive aspect and a social aspect.

The preventive measures contained in the Draft Bill are designed to allow for the gathering of certain information from companies to identify those experiencing financial difficulties at a stage when they might still benefit from efficient reorganisation and out-of-court procedures (e.g., the conciliation process). The reorganisation measures to be made available to distressed companies also provide for instruments designed to preserve and reorganise business activities while taking the rights of creditors into account, which companies will be able to request on their own initiative.

The purpose of the repressive element of the Draft Bill is to prevent companies that act in bad faith from abandoning their business and starting a new one with impunity. The Draft Bill also introduces an administrative dissolution procedure without liquidation and aimed at eliminating 'empty shells' in a timely and cost-efficient manner by avoiding formal bankruptcy proceedings.

57 2020 Ministry of Justice annual activity report, Government of the Grand Duchy of Luxembourg, Part II – Activity reports from the courts and the public prosecutors' offices, p. 33.

58 See Section VI.ii.

59 Draft Bill No. 6539, supplementary opinion of the Council of State dated 20 December 2019.

60 Luxembourg 2009 governmental programme, p. 108.

61 If the viability of a company's activities is threatened to the extent that it needs to adopt measures that can be enforced against third parties, the debtor has the right to apply for a judicial reorganisation procedure with the relevant district court.

62 The reorganisation measures to be made available to distressed businesses under the Draft Bill encompass out-of-court procedures and judicial procedures, which are adapted to the size of the relevant business and are largely voluntary.

The Draft Bill also includes a social aspect. As a matter of principle, all the rights and obligations resulting from employment contracts are transferred to the purchaser of the assets of the relevant distressed company.