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Bonn Steichen & Partners is a multidisciplinary team that provides solution-driven support on a wide range of Luxembourg bankruptcy and insolvency issues. BSP regularly represents clients in non-judicial debt restructurings, including the refinancing or the renegotiation of existing debt, and helps clients assess the strength of their security in a bankruptcy or insolvency scenario and develop innovative solutions to maximise their recovery. Drawing on its experience in corporate finance, capital markets and litigation, BSP represents corporate debtors, lenders, receivers, directors and guarantors on: restructuring of debt and loans; refinancing for lenders; debt-to-equity conversions; corporate rescue; asset recovery in large bankruptcies; distressed debts trading; debt collections; and cross-border dispute resolution, including forcing debtors into bankruptcy.

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1. Market Trends and Developments

1.1 State of the Restructuring Market

In 2018, there were 35,113 incorporated companies in Luxembourg, and between 2,500 and 3,500 new companies are incorporated each year. There has been a leap in the number of bankrupt companies, with a substantial 27.81% increase in bankruptcies in 2018 (1,195 bankruptcies) compared to 2017 (935 bankruptcies). Overall, the annual figure has steadily increased since the 1990s, with a first peak of 1,033 bankruptcies in 2013.

Although the number of new bankruptcies increased in most sectors compared to 2017 (among the production, construction, trade and services sectors), the construction sector continues to experience a decrease (-1.28% compared to 2017). The sector with the highest number of bankruptcies (882 bankruptcies, representing 73.81% of the total number of bankruptcies in Luxembourg in 2018) is the services sector. However, even if this figure remains high, it is stable. The trade sector also experienced an increase of 29.59% with 254 bankruptcies in 2018 compared to 196 in 2017.

The above figures are provided by Creditreform and the website of the Ministry of Justice (*La justice en chiffres 2018*).

1.2 Changes to the Restructuring and Insolvency Market

For several years, Luxembourg legislators have expressed the wish to significantly amend the legislation on insolvency. On 26 February 2013, a draft bill no 6539 on business preservation and modernisation of the bankruptcy law (the Draft Bill) was presented, which is closely modelled on the Belgian insolvency law (especially the law on business preservation dated 31 January 2009). Since then, the Draft Bill has been amended a few times in consideration of the opinions of various state bodies, including the Council of State and the Chamber of Commerce. The Draft Bill aims to provide new tools favouring business reorganisations over liquidations.

Although the Draft Bill already represents a real change in Luxembourg insolvency law, the legislator should take this opportunity to implement the last European directive no 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventative 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 (Directive on restructuring and insolvency) – which should be implemented by the EU member states by 17 July 2021 at the latest.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

Under current Luxembourg insolvency law, the insolvency procedures may be divided into:

- those aiming to reorganise the debtor in order to protect its business: namely, the stay of payments (*sursis de paiement*), composition with creditors to avoid bankruptcy (*concordat préventif de la faillite*) and controlled management (*gestion contrôlée*); and
- those intending to wind up and sell and liquidate the assets of the debtor: namely the bankruptcy (*faillite*) and compulsory liquidation (*liquidation*).

Liquidation is not an insolvency procedure per se, meaning that Luxembourg has not included the liquidation procedure among Annex A of EU Regulation 2015/848 of 20 May 2015 on insolvency proceedings, where each member state mentions national insolvency proceedings corresponding to the definition of an insolvency proceeding, as defined by the Regulation, and which therefore enters into its scope. This liquidation procedure is more a sanction provided by Article L1200-1 of the law on commercial companies dated 10 August 1915, as amended, in case of a breach of this law. Proceedings can only be opened at the request of the public prosecutor. Alternatively, a shareholder can ask for judicial liquidation where there is a cause for liquidation on serious grounds (*pour de justes motifs*).

The framework of the above-mentioned general insolvency regime is regulated by:

- the Law of 14 April 1886 on composition with creditors, as amended;
- the Grand-Ducal Regulation of 24 May 1935 on controlled management;
- the Code of Commerce (Section III, Articles 437 to 614), dealing with stay of payments and bankruptcy proceedings; and
- the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recasting and replacing Regulation (EU) 1346/2000 of 29 May 2000 for insolvency procedures opened after 26 June 2017).

In addition, specific insolvency regimes or provisions exist for:

- credit institutions and professionals of the financial sector: the law of 18 December 2015 on resolution, recovery and liquidation measures of credit institutions and some investment firms, on deposit guarantee schemes and the indemnification of investors (as amended);

- insurance and reinsurance undertakings: the law of 7 December 2015 on the insurance sector (as amended);
- regulated investment funds and funds manager:
  (a) the law of 15 June 2004, as amended, on investment company in risk capital (SICAR);
  (b) the law of 13 February 2007 on specialised investment funds (as amended);
  (c) the law of 17 December 2010, as amended, pertaining to undertakings for collective investment (UCIs); and
  (d) the law of 23 July 2016, as amended, on reserved alternative investment funds (RAIFs);
- regulated securitisation vehicles and affiliates: the law of 22 March 2004 on securitisation, as amended; and
- notaries: the Grand Ducal decree of 31 December 1938 related to the reorganisation of the notarial profession.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

As explained in **2.1 Overview of Laws and Statutory Regimes**, the main distinction between insolvency procedures in Luxembourg is their purpose: either the reorganisation of the business or its winding-up. It should be stressed that although reorganisation procedures are available, these are outdated and are rarely admitted by the courts. The most common and widely used proceeding in Luxembourg is bankruptcy.

Some proceedings are opened solely on a voluntary basis, for example, stay of payments, composition with creditors and controlled management, and other, like bankruptcy proceedings, could be either triggered by the debtor or a third party (creditor, public-regulated agencies and public authorities such as tax administration).

Stay of Payments

Conditions

The debtor must experience temporary liquidity problems which permit suspension of payments to their creditors for a given period of time (Commercial Code Article 593) because:

- sufficient assets or income exist to satisfy the creditors in principal or interest; or
- there are strong signs that the merchant may return to solvency.

Procedure

The merchant must file a petition describing the events on which the request is based on, an overview of the debtor's assets and liabilities, and a list of the creditors, with the district court and the Supreme Court at the same time.

One or several experts will be designated by the district court to review the business of the merchant, and a judge will be appointed to supervise the operations. Within 15 days of the request, the supervising judge will make their report at a meeting on the date set by the president of the district court, during which creditors may declare the amounts of their claims and state whether they approve of, or reject, the request for stay of payments. Indeed, the approval of the majority of creditors, representing three quarters of the aggregate debts, is needed to allow suspension of payments.

The opinion of the district court is afterwards communicated to the Supreme Court, which should hand down its decision within eight days. If the stay of payments is granted, the court assesses the duration of the measure and appoints one or more commissioners to supervise the procedure.

Effects

For the duration of the proceedings:

- the creditors' rights are suspended, but only for the commitments taken prior to the opening of the proceedings; and
- the management body remains in place but under the supervision of the commissioner(s).

Controlled Management

Conditions

A merchant of good faith may apply for a controlled management procedure if:

- its credit is undermined; or
- the settlement of its liabilities is jeopardised.

The competent district court will grant such procedure if it deems that controlled management will enable the recovery of the debtor's business or improve the position of the debtor in respect of the sale of its assets (Luxembourg Grand-Ducal Decree of 24 May 1935, Article 1).

Procedure

The application for controlled management proceedings filed by the merchant should include a list of the creditors and evidence that the prospects for reorganisation are realistic.

As for the stay of payments proceedings, a judge will be appointed to review the debtor's business and prepare a report for the district court. If the debtor's prospects for reorganisation (or orderly liquidation) appear feasible, controlled management will be granted, after the debtor's explanation has been heard, and one or more commissioners will be appointed to submit a reorganisation plan or a plan regarding the realisation/distribution of the debtor's assets. Otherwise, the only remaining possibility will be bankruptcy.

Between the opening of controlled management until the final decision of the court on whether or not to admit the request to be placed under controlled management, the enforcement rights of all creditors (even backed by a security) against the debtor's assets are stayed.

Effects
The debtor is still in charge of running its business, but under the supervision of the commissioner(s), which means that the debtor's decisions must necessarily be approved by the commissioner(s), otherwise they will be voidable (the commissioner may also introduce proceedings seeking the nullity of any abnormal transactions concluded during the look-back period). In case of dispute, the matter is settled by a decision of the court.

Within the deadline fixed by the court, the commissioner(s) must elaborate either a reorganisation plan or a liquidation plan of the debtor's assets. The content of this plan is notified to each creditor and published in the official gazette of the Grand Duchy of Luxembourg (*Mémorial*).

The vote of the creditors must then take place within 15 days of the notification and the publication:

- the court will approve the plan only if it is found to have the approval of the majority of creditors representing more than half of the debtor's aggregate debt (all debts of the debtor which arose before the designation of the delegated judge should be taken into account). Creditors may submit observations to the court, and for the vote, abstention is deemed equivalent to having voted in favour.

Once the plan receives final approval, it will become binding upon the debtor and all creditors (whether they have been part of the agreement or not), and the debtor will regain control over its business; or

- if the plan is rejected by the creditors or the court, the court may either declare bankruptcy or grant further time to the commissioner(s) for the preparation of an alternative plan.

Composition with Creditors in Order to Avoid Bankruptcy
Composition with creditors (or scheme of composition) is a protective measure that enables merchants or commercial companies in financial difficulty to come to an arrangement with their creditors in order to avoid bankruptcy. The purpose of the composition agreement may also be the assignment of assets (*concordat par abandon d'actifs*). In that specific case, the debtor and creditor must appoint one or several persons, as liquidators, whose mission will be the selling of the debtor's assets under the supervision of the delegated judge.

Conditions
Only honest but unfortunate debtors may apply for such proceedings, which can be opened before or after the bankruptcy.

Procedure
The request of the debtor must be submitted in writing to the district court (commercial chamber) with jurisdiction over the debtor's place of residence. The request must include:

- the presentation of the events that led to the financial difficulties;
- a detailed estimate statement of the debtor's assets;
- a list of its creditors (details and amount of their claims); and
- the proposed composition.

If the court deems the request admissible, it appoints a delegated judge (*juge délégué*) in order to investigate the debtor's financial situation and establish a report within eight days. Either:

- the court rules that there are no grounds for pursuing the procedure to obtain a composition with creditors and it issues a bankruptcy judgment, or
- the court accepts the scheme of composition request and sets a date for a meeting of creditors (in this case, the costs for the issuance of the notice to attend the meeting will be covered by the debtor).

Creditors must be informed about the meeting at least eight days in advance. At the meeting, the judge exposes their report on the state of the debtor's business, and the debtor presents the prepared scheme of composition to the creditors.

The creditors then declare the amount of their claims in writing and whether or not they agree to the proposed composition (creditors who are unable to attend the meeting can submit their claims to the court clerk within the week following the meeting and prior to the final deliberation). The composition can only be approved upon the agreement of the majority of the creditors, representing 75% of the total claims accepted definitively or provisionally. Secured creditors are unable to vote with regard to their claims, except if they waive their lien, pledge or mortgage.

At a second meeting, a judgment approving (or not approving) the composition is issued and, within three days, it is published in the auditorium of the court and newspapers.

Effects
Upon the approval of the composition with creditors:

- the arrangement becomes binding between all creditors (but for taxes and other public charges, debt in respect of

alimony, or debts covered by a non-waived lien, pledge or mortgage) and only applies to liabilities incurred prior to the approval; and
- it results in a temporary suspension of all subsequent enforcement measures.

The execution of the scheme of composition is examined every three months by the delegated judge. If the debtor's situation has improved, the procedure will end and the debtor will have to pay all their creditors in full. In a case where the debtor is declared bankrupt within the six months following the termination of the composition procedure, the date of cessation of payments may be set as the date on which the petition for composition was filed.

Bankruptcy
When a merchant or commercial company can no longer be placed under controlled management, suspension of payments or seek a composition with its creditors in order to reorganise and continue its business activity, bankruptcy remains the only alternative (see **2.5 Commencing Involuntary Proceedings** for other opening cases).

Conditions
If a merchant or commercial company ceases payments and loses its creditworthiness (ie, is unable to raise new funds), it is regarded as being in a state of bankruptcy and must file a bankruptcy petition with the clerk of the competent court within one month from the date of cessation of payments.

Procedure
The debtor petitioning for bankruptcy must provide the clerk with a written request containing the balance sheet of the business (or a note indicating the reasons why this cannot be submitted), the books and accounts held for business accounting purposes, and certain additional documents (such as a recent extract from the Trade and Companies Register, a statement of the assets and liabilities).

After hearing the debtor, the bankruptcy judgment will be handed down by the court and this will set the date of cessation of payments (this date may not be more than six months prior to the opening of the bankruptcy, this period constituting the hardening period). The bankruptcy trustee (*curateur*) and the supervisory judge of the procedure will also be appointed within the judgment declaring the bankruptcy.

The judgment mentions the newspapers where the bankruptcy must be published (this information is also available in the Luxembourg Business Register).

Effects
As of the date of the declaration of bankruptcy (it should be stressed that the effects of the judgment are retroactive and start at midnight on the day the bankruptcy is opened), the debtor no longer has the right:
- to administer his/her/its estate; and
- to take legal action as a defendant or claimant in matters relating to his/her/its estate.

The bankruptcy trustee represents the interests of the debtor, as well as representing the body of creditors, and administers the assets of the bankrupt party (an inventory of the assets must be prepared by the trustee). The trustee has the duty to manage the bankruptcy in the interest of the creditors, with all due diligence, under the supervision of the supervisory judge whose authorisation shall be requested by the trustee for certain transactions (eg, a sale of assets).

As mentioned above, the judgment declaring bankruptcy can set the period of cessation of payments by the bankrupt party to a date prior to the declaration of bankruptcy, which date cannot precede the date of the judgment by more than six months. The period between the cessation of payments and the declaration of bankruptcy is deemed a hardening period, or "suspect period" (*période suspecte*), during which certain acts performed by the debtor that could be detrimental to the rights of the creditors are deemed null and void (for more details, see **13. Transfers/Transactions That May Be Set Aside**).

In principle, after the opening of the bankruptcy, creditors may not:

- individually sue the debtor; or
- enforce judgments/sentences, even if they precede the bankruptcy. Exceptions are made for certain creditors who have special preferential claims (see **4.2 Rights and Remedies**).

All creditors must file a claim with the clerk of the district court. During a hearing for the verification of the claims, the trustee, together with the bankruptcy judge, will decide whether the declared claim will be accepted or not (creditors whose claims have been rejected may refer to the district court for judgment).

The purpose of bankruptcy is the realisation of all assets held by the debtor, either by private contract or public auction, with the intention of satisfying the debtor's creditors. The distribution of the proceeds among the creditors is based on their rank and occurs after the payment of the administrative costs and fees of the bankruptcy trustee. After all the proceeds have been distributed, the trustee may then file a motion to close the procedure (including a detailed report about the bankruptcy), which will then be decided by the court.

2.3 Obligation to Commence Formal Insolvency Proceedings

As mentioned above, only a bankruptcy procedure must be mandatorily commenced when a company has ceased mak-

ing payments. Under Luxembourg law, this means that the company:

- is no longer able to pay its debts as they fall due; and
- can no longer obtain credit (ie, its borrowing ability is totally undermined).

The director(s) or management body of the company should file a petition to have the company declared bankrupt within one month of the cessation of payments. Otherwise, they could be criminally sanctioned (such as with a fine or imprisonment) or professionally sanctioned (barred for a certain time from managing a business). In addition, if there is a delay in filing a petition for bankruptcy, and should the director(s) or management body be found to have committed other acts of mismanagement, they could be held civilly liable in tort and be ordered to bear part of, or all of, the assets' shortfall.

2.4 Procedural Options

If the debtor is in a temporary cessation of payments with sufficient solvency to settle all its liabilities, it could petition the district court for a stay of payments. In such cases, all payments due to the creditors are suspended while the debtor is trying to restore its financial situation.

Within one month of the state of cessation of payments, or even after bankruptcy proceedings have been initiated against a debtor, the debtor may still file a petition with the district court for a composition with its creditors in order to avoid bankruptcy. This procedure, consisting of a voluntary arrangement between the debtor and its creditors, must be submitted for the approval of the district court in order to become binding on all creditors (only regarding the commitments taken by the creditors in such agreement).

2.5 Commencing Involuntary Proceedings

Besides the debtor, bankruptcy proceedings can be initiated:

- by the district court, upon its sole discretion, during the composition with creditors or the filing of a controlled management or a stay of payment procedures, if the court considers that the conditions of bankruptcy are met; and
- at the request of any creditor, regardless of the amount of their claim, if the conditions for bankruptcy can be proved.

2.6 Requirement for Insolvency

Under Luxembourg law, the state of cessation of payments should be distinguished from the notion of insolvency. A debtor is deemed insolvent when its liabilities are higher than its assets. Therefore, a debtor may be insolvent but not in cessation of payments if it has sufficient credit (and the opposite could also be true, meaning that a debtor could be solvent but in cessation of payments).

2.7 Specific Statutory Restructuring and Insolvency Regimes

The general insolvency regime is adjusted for some specific entities such as:

Credit Institutions and Professionals of the Financial Sector

Voluntary procedures like stay of payment and controlled management are accessible for credit institutions or professionals of the financial sector and can be requested when those entities experience creditworthiness issues, or their authorisation by the financial authority has been temporarily withdrawn (law of 5 April 1993, as amended by the law of 18 December 2015 on resolution, recovery and liquidation measures of credit institutions and some investment firms, on deposit guarantee schemes and indemnification of investors).

When voluntary procedures fail, the law of 18 December 2015 provides for:

- the "resolution" (winding-up) of the credit institution and some investment firms, either on an individual or a group basis, under the authority of the Luxembourg financial authority (*Commission de surveillance du secteur financier* or CSSF). The CSSF, acting in its capacity of resolution council, could set up a resolution plan (either to reorganise or liquidate the entity or its group) and it uses a wide range of instruments, such as:
  (a) the segregation of bad assets in order to manage the entity;
  (b) the sale of part of the business by the competent authority without the consent of the shareholders;
  (c) the transfer of some assets or shares into an ad hoc bridge vehicle controlled by the CSSF; and
  (d) a bail-out.
- the compulsory liquidation procedure (requested by the CSSF or the public prosecutor) is opened when:
  (a) it becomes clear that the measures implemented to restore the financial situation of the entity will not work;
  (b) the entity is so undermined that it may no longer meet its commitments; or
  (c) the authorisation granted by the CSSF has been definitively withdrawn.

The district court will decide if the procedure is opened and which general rules of bankruptcy apply to it. In any case, the opening of compulsory liquidation proceedings leads de facto to the withdrawal of the authorisation granted by the CSSF.

Insurance and Reinsurance Undertakings

The laws of 6 December 1991 and 7 December 2015 on the insurance sector apply to insurers and reinsurers. Besides all the procedures available within the general insolvency

regime (stay of payment, composition with creditors, controlled management and bankruptcy), and similarly within the special insolvency regime provided for credit institutions, a compulsory liquidation procedure can be opened for insurers and reinsurers at the request of the public prosecutor or the insurance regulating agent (*Commissariat aux assurances*).

Regulated Investment Funds and Regulated Securitisation Vehicles
The insolvency regime of such entities substantially mirrors the regime applicable to credit institutions and professionals of the financial sector and is limited to stay of payments and compulsory liquidation procedures. One difference is the fact that the withdrawal of the authorisation granted by the CSSF to the relevant entity will immediately trigger the stay of payments. Afterwards, a compulsory liquidation procedure may be commenced at the demand of the CSSF or the public prosecutor, but the investors have no right to request such opening.

A company managing funds or a securitisation entity responding to the general insolvency regime, is subject to the specific laws mentioned in **2.1 Overview of Laws and Statutory Regimes**.

Apart from those described above, there are no other insolvency provisions relating to specific sectors.

3. Out-of-court Restructurings and Consensual Workouts

3.1 Restructuring Market Participants
Luxembourg insolvency law does not presently provide for any regulated consensual mechanism or out-of-court proceedings. Therefore, a consensual process, which, for example, could start with a standstill period in order to give time to the debtor, relies fully on the willingness of creditors to help the debtor face its financial difficulties. Nonetheless, the Luxembourg Chamber of Commerce may help to provide economic recovery measures (such as financial aid or a state guarantee) if a business finds itself in difficulties.

3.2 Consensual Restructuring and Workout Processes
This is not relevant under Luxembourg insolvency law.

3.3 New Money
There is no "new money" privilege under Luxembourg insolvency law.

3.4 Duties on Creditors
This is not relevant under Luxembourg insolvency law, as mentioned above in **3.1 Restructuring Market Participants**.

3.5 Out-of-court Financial Restructuring or Workout
This is not relevant under Luxembourg insolvency law, as mentioned above in **3.1 Restructuring Market Participants**.

4. Secured Creditor Rights and Remedies

4.1 Liens/Security
Security Taken by Secured Creditors Over Real Estate Property
In Luxembourg, the most common types of security granted over real estate property are:

The mortgage (hypothèque)
This requires a notarial deed and registration with the administration registry (*Administration de l'enregistrement et des domaines*) in order to take rank (except for the hidden mortgage – *hypothèque occulte* – of the state in case of inheritance). In order to be enforceable towards third parties, a mandatory requirement is the registration of the original notarial deed with the mortgage registry (*Bureau de conservation des hypothèques*) of the judicial district where the real estate is located. In the tenth year, the renewal of the registration (for another ten years) of the mortgage should take place in order to remain enforceable vis-à-vis third parties.

The pledge over real estate (antichrèse)
This is a type of security less commonly used by banks, which usually prefer mortgages. As the mortgage, this pledge must be written and registered with the administration registry and the mortgage registry. The dispossession of the pledgor perfects the security, and the pledgee will have possession of the real estate until total payment of its debt is completed (eg, by the collection of rent provided by the real estate).

The seller's lien (privilège du vendeur)
This is provided by the Luxembourg Civil Code (Article 2103, 1°) and it gives the seller of real estate a lien on sold real estate until receipt of payment of the full purchase price.

The lender's lien (privilège du prêteur de deniers)
Also provided by the Civil Code (Article 2103, 2°), this applies to lenders lending funds to finance the acquisition of real estate. This lien must be registered in a notarial deed with the administration registry, and with the mortgage registry in order to be opposable by third parties for ten years (renewable).

Security Over Tangible Movable Property
Tangible movable property could be defined as assets with physical substance which can be moved, such as trading stock, machinery, or aircraft and ships (for which, however, in the case of a weight of more than 20 tons, a specific kind of mortgage is applicable in accordance with the laws of 19

June 1966 and 29 March 1978). The most common forms of security are:

Pledges
There are two types of pledges: civil pledges (gage civil) governed by the Luxembourg Civil Code (Articles 2073 to 2084), or commercial pledges governed by the Luxembourg Commercial Code (Articles 110 to 188) and, to some extent, the Luxembourg Civil Code (including the pledge over a going-concern).

For any pledges, either civil or commercial, the grantor of the pledge is not in possession of the pledged asset and the lien deriving from the pledge agreement will last as long as the pledged assets are held by the pledgee or by a third party designated as security agent or holder by the pledgee and the pledgor.

Civil pledges and pledge over a going concern must be in writing, contrary to commercial pledges which may be proved by any means provided by the Luxembourg Commercial Code. All types of pledges must be notified and accepted by the debtor in order to be enforceable against third parties. In addition, for a pledge over a going concern, the pledge must be registered with the Mortgage Registry.

The transfer of ownership for collateral purposes
This is where:

- the legal title to the collateral is transferred to the lender in order to secure the debt incurred; or
- the ownership rights pertaining to the assets are transferred to the lender by way of a fiduciary contract (*contrat fiduciaire*) and the exercise of these rights is limited to the terms agreed between the parties to the fiduciary contract.

Security Over Intangible Movable Property
By contrast, intangible movable property refers to an item of individual value that cannot be touched or held, including financial instruments (shares, units, bonds, etc), cash or a securities account, intellectual property (IP) rights (patents, trade marks, designs and copyrights).

Financial instruments
These could be (as defined by the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended):

- either pledged or their ownership could be transferred for collateral purposes, in the same manner as described above; or
- the object of a repurchase agreement (*mise en pension*), which involves transfers of assets made during the term of a contract that are intended to secure the balance agreed as the obligations between the parties, either for a specific repurchase transaction, or globally for all or part of the transactions between the contracting parties.

The most common forms of security granted over IP rights
These are transfers of title (in order to be opposable by third parties, this transfer must be registered with the Benelux Office of Intellectual Property – for trade marks and designs – and with the Patent Registry of National Intellectual Property – for patents – or pledges (enforceable against third parties if registered at the Administration Registry and at the Mortgage Registry of the judicial district).

Bank account
Pledges over bank accounts can be granted to the benefit of the pledgee, and must be notified to the account bank (in addition to the formalities described above for civil or commercial pledges, and required for the enforceability of pledged-against third parties).

Guarantees
First demand guarantees (garanties à première demande)
A first-demand guarantee is a "self-sufficient" security, which means that the guarantor cannot oppose any exceptions or exemptions derived from the initial loan agreement by the lenders, nor can the guarantee automatically be transferred with the initial loan agreement. The guarantee may take the form of a letter or an agreement. The guarantee is not subject to any filing requirements and may be enforceable towards third parties at the time of the letter or the agreement, as applicable.

Personal guarantee or suretyship (cautionnement)
A personal guarantee or suretyship is an accessory to a principal obligation, that is, the guarantor can oppose any exceptions or exemptions the lenders derive from the initial loan agreement and the security interest will automatically be transferred with the initial loan agreement as its accessory. The suretyship takes on the form of an agreement under private seal and becomes enforceable against third parties at the time of the agreement. The suretyship is not subject to any filing requirements.

4.2 Rights and Remedies

Usually, secured creditors are entitled to enforce their security if the secured debt has become due and payable, and the debtor has failed to repay the debt.

The beneficiary of a pledge over a mortgage or a going-concern, whose claim has become due and payable, can serve a summons to pay and, without a judicial order, seize the pledged assets. However, enforcement is a court-driven process, and a court order is required for realisation by public auction or appropriation.

Regarding a transfer of ownership for collateral purposes, the creditor may, without prior notice, set off the remaining

debt due against the transferred assets, if the secured debt is not repaid in full. If there is a remainder in relation to the collateral, the creditor must return the remaining assets to the debtor.

In relation to pledges over financial instruments governed by the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended, the pledgor has the right, when an agreed event of default has occurred, and unless otherwise agreed, to enforce without prior notice the pledge by appropriation, sale or compensation of the assets, unless the parties agree otherwise. The pledgor can also apply to the court to obtain a decision ordering the appropriation of the secured assets.

Generally, under Luxembourg insolvency law (which is creditor-friendly), the start of insolvency proceedings does not prevent the enforcement of security interests, especially security granted over financial instruments.

However, when the debtor is facing financial difficulties and is trying to reorganise its business, the granting of new security could be restricted and the enforcement of security can be temporarily stayed.

Stay of Payments
During the moratorium granted by the district court, no enforcement procedure can be brought against the debtor or its assets. However, the procedures of validation of attachments carried out on the assets of the debtor before the granting of the moratorium remain in place (Article 604 Commercial Code). The district court may withdraw the attachment, under certain circumstances and after having heard the debtor and its creditors, as well as the commissioner appointed by the court to supervise the procedure.

Without the permission of the commissioner appointed by the district court to supervise the procedure, the debtor cannot dispose of, pledge or mortgage their movable or immovable property (Article 603 Commercial Code).

Controlled Management
The judgment opening a controlled management procedure automatically leads to a stay of enforcement regarding any mortgages, liens and pledges, between the filing of the petition for controlled management until the final decision of the court on whether or not such request is admitted (Luxembourg Grand-Ducal Decree of 24 May 1935, Article 3). The merchant cannot, without the permission of the commissioner appointed by the district court, dispose of, pledge or mortgage his movable or immovable property.

The reorganisation plan, or the plan regarding the realisation and distribution of the debtor's assets submitted by the appointed commissioner(s), must take all the interests at stake equally into account (interests of creditors and of the merchant). Such plans must abide by the rank of pledges, liens and mortgages, as provided by the law (conventional forfeiture, termination and penalty clauses being inapplicable to the plans aimed at the reorganisation or realisation and distribution of assets).

Bankruptcy Proceedings
Secured creditors remain entitled to enforce their security after the bankruptcy procedure is commenced.

Nonetheless, in the specific context of a composition with creditors procedure or winding-up arrangements (which could be requested during and sometimes after a bankruptcy proceeding), secured creditors will only be entitled to take part in the decision-making process during operations related to the procedure if they waive their mortgages, liens and pledges, in all or in part (in the latter case, their claim will be taken into account in the vote up to this waived portion).

4.3 Typical Timelines
The timeline for enforcing a secured claim with a lien or security will not be disturbed by the commencement of a bankruptcy proceeding in Luxembourg, and the procedure will remain the same as in the situation where the debtor is solvent. However, if the claim is filed within the bankruptcy proceedings and then challenged in court, the enforcement of the lien/security may be delayed while the procedure challenging the claim is pending.

4.4 Foreign Secured Creditors
Under Luxembourg insolvency law, no special procedures or impediments are applicable to foreign secured creditors (for insolvency proceedings that have occurred within several member states of the European Union, see **8. International/ Cross-border Issues and Processes**).

4.5 Special Procedural Protections and Rights
As described above, secured creditors remain entitled to enforce their security or lien in a bankruptcy (for example, the enforcement of their pledges, either on the cash or assets of the debtor). In addition, they also benefit from a better rank than unsecured creditors and specific rights attached to their security's interest (such as retention rights).

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities
As mentioned in **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, during stay of payments or controlled management procedures, creditors are not entitled to payment or enforcement of their security. There is also a stay on proceedings.

In the course of bankruptcy, differences exist between:

- secured creditors, who may obtain priority payment for their debts that pre-date the opening of the bankruptcy proceeding, through the enforcement of their security (if the security is not sufficient to collect the entire amount of its claim, a creditor can file a claim within the proceedings for the outstanding amount). In the case of the opening of a composition with creditors, the attendance of secured creditors at creditors' committee meetings will be subject to their having first given up their security/lien; and
- unsecured creditors are subject to the following rules: prohibition of payments (they need to file their claim in order to be entitled to dividends, if any), and a stay on proceedings.

5.2 Unsecured Trade Creditors

Unsecured trade creditors do not have higher priority or right than other unsecured creditors.

5.3 Rights and Remedies for Unsecured Creditors

All creditors, including unsecured creditors, are empowered to file a petition with the district court (commercial chamber) seeking the commencement of a bankruptcy proceeding against a debtor if they can demonstrate that the debtor is in cessation of payments.

Since the year 2000 (and the introduction of Article 467-1 of the Commercial Code), if the unsecured creditor is a supplier of goods and has stipulated a clause of retention of title in writing, they will be entitled to recover the delivered goods if full payment is not made by the bankruptcy trustee.

5.4 Pre-judgment Attachments

In the absence of an enforceable title, an unsecured creditor, whose debt is certain, liquid and due, may petition the president of the court of the residence of the debtor or of the attached third party in order to obtain authorisation for attachment proceedings. If the authorisation for attachment is granted, the attaching creditor serves the presidential order to the attached third party, which blocks the funds held by it on behalf of the debtor. The attachment itself mustthen be followed within eight calendar days by a court action filed at the initiative of the creditor (the attaching party) against the debtor in order to have the attachment validated. Unless such validation action is completed prior to the start of insolvency proceedings, the validation procedure pertaining to the attachment will be stayed during the reorganisation proceedings (stay of payments, controlled management, scheme of composition with creditors) and the bankruptcy proceedings. In the case of bankruptcy proceedings, the purpose of the procedure (if pursued by the bankruptcy trustee) will be to determine the amount of the claim of the attaching party (and not the payment, which could only occur within the distribution made by the trustee in the course of the bankruptcy).

5.5 Timeline for Enforcing an Unsecured Claim

Unsecured claims cannot be enforced if there is a stay of payments, which is the case while bankruptcy proceedings are pending. Usually, when payments are made during the enforcement of a reorganisation plan approved by the court, the unsecured claim will, in theory, be paid in accordance with the rank provided in the plan (on a pro rata basis). Otherwise, during the bankruptcy proceedings, taking into account the fact that there are usually none or few assets and other privileged claims, unsecured creditors will not usually be successful in the collection of their claims.

5.6 Bespoke Rights and Remedies for Landlords

Under Luxembourg insolvency law, the opening of bankruptcy proceedings will not lead to the termination of the lease agreement. Nonetheless, as landlords have a preferential claim (Article 2102 Civil Code), the bankruptcy trustee will not be keen to increase the amount of privileged liabilities. Usually, the trustee will terminate the contract as soon as possible in order to avoid further costs for the proceedings.

5.7 Foreign Creditors

Luxembourg insolvency law does not provide any special procedures or impediments applicable to foreign unsecured creditors, the principle being equal treatment between creditors (non-foreigners and foreigners).

All creditors should file their claim within the timeframe set by the declaration of bankruptcy (20 days from the day of the court ruling). In reality, claims are often filed after the date set by the court, as non-compliance with the timeframe will not cause them to be excluded from all rights in the bankruptcy if the claim is filed before the closure of the procedure (they will, however, not participate in the distribution of proceeds realised prior to the filing of their claim).

5.8 Statutory Waterfall of Claims

Except for claims considered as "out of estate of the bankruptcy" (this is mainly the case for the claim of the pledgee over a going-concern and the first registered mortgage creditor), the waterfall for the settlement of preferential claims in bankruptcy is as follows (before any payments of unsecured creditors):

- legal costs resulting from the bankruptcy proceedings;
- claims of the debtor's employees (super-privileged claims – limited to the amount that would normally be due in the case of dismissal with notice from the date of the declaration of bankruptcy – and, where applicable, any outstanding salaries during the six months of work prior to the bankruptcy); and
- tax claims from public administrations.

Completing the above waterfall of payments, a distinction must be drawn depending on whether the claim concerns personal property or real property.

In the case of a sale of personal property (Article 2102 of the Civil Code), the waterfall of payments is continued as follows (this list is not exhaustive):

- claim of the landlords;
- debts backed by pledges;
- costs for the preservation of the goods held in deposit;
- debts of the seller of goods which are still in its possession; and
- four other ranks which are not commonly used concern the expenses of an innkeeper, charges linked to a car, claims resulting from the misconduct of a public agent, claims arising from an accident.

In the case of a sale of real estate property (Article 2013 of the Civil Code), the waterfall of payments is pursued in the following order (this list is not exhaustive):

- claim of the seller of the property; and
- debts of the lender of funds for the acquisition of the real estate property.

5.9 Priority Claims in Restructuring and Insolvency Proceedings

As indicated in the section above, debts resulting from the cost of the bankruptcy procedure, employees' claims (only for the sums of super-privileged and outstanding salaries earned during the six months of work before the bankruptcy, otherwise, the sums are considered to be unsecured claims) and claims of the administration have a top ranking in the waterfall of payments under Luxembourg insolvency law.

6. Statutory Restructurings, Rehabilitations and Reorganisations

6.1 Statutory Process for a Financial Restructuring/ Reorganisation

There is no specific proceeding under Luxembourg insolvency law aimed at the financial restructuring or reorganisation of the debtor.

As described in **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, the only procedure which could lead to a financial restructuring or reorganisation plan of the debtor's debts is controlled management (*gestion contrôlée*), which is rarely used.

This procedure is:

- carried out under the supervision of the court and a court-appointed official; and
- not confidential, and cannot be initiated in an expedite mode.

6.2 Position of the Company

The opening of controlled management proceedings leads to the stay of enforcement rights of all creditors (even backed by a security) against the debtor's management until the final decision of the court on whether or not the request to be placed under controlled management is accepted.

The debtor remains in charge of running its business but under the supervision of the commissioner(s) (remunerated by the debtor). In that respect, the commissioner(s) must attend the meetings of the board of directors or management board, or call a meeting of the board.

Most of the decisions of the debtor must necessarily be approved by the commissioner(s) otherwise they will be voidable, such as:

- the disposal of a pledge or mortgage on movable or immovable assets;
- compromising, borrowing and receiving any funds; and
- making any payment or carrying out any act of administration.

6.3 Roles of Creditors

The reorganisation plan must be communicated to all the creditors and to the known joint and several co-debtors and guarantors.

As of the date of communication of the plan or publication with the Trade and Companies Register, the creditors have 15 days to inform the court of their approval or opposition to the plan. The plan can only be approved by the court if more than half the creditors, representing more than half of the liabilities, have approved it.

6.4 Claims of Dissenting Creditors

There are no mechanisms of cram-down or cram-up of dissenting creditors under Luxembourg insolvency law, but abstention from voting is deemed to be approval of the plan.

6.5 Trading of Claims Against a Company

A creditor is able to assign its claims to a third party after the opening judgment of a controlled management (except when such assignment specifically requires, by virtue of a contract, the approval of the debtor). In order for the assignee to take part in the proceedings, it is recommended that the court and commissioner(s) should be informed in advance of the assignment.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

There are no specific provisions in Luxembourg insolvency law with respect to reorganisation of a corporate group, as the notion of a corporate group is not acknowledged by Luxembourg law. In theory, if the registered offices of all the companies in the group are located in the same jurisdiction (either Luxembourg or Diekirch), an administrative measure of consolidation of the insolvency proceedings may be requested by the companies (if this measure is deemed as good administration of justice by the court).

6.7 Restrictions on a Company's Use of or Sale of Its Assets

See **6.2 Position of the Company** for the restriction of the use or sale of a company's assets by the debtor placed in controlled management.

6.8 Asset Disposition and Related Procedures

The sale of assets must necessarily have been authorised by the commissioner(s) and the acquired assets will be free and clear of claims.

6.9 Secured Creditor Liens and Security Arrangements

Without their express consent, secured creditor liens and security arrangements cannot be released through the controlled management procedure.

6.10 Priority New Money

There is no priority for new money in the framework of Luxembourg insolvency law. However, such financing may still be secured by assets of the company, upon the authorisation of the commissioner(s), including by assets encumbered by pre-existing secured creditor liens/security.

6.11 Determining the Value of Claims and Creditors

In controlled management, the debtor must provide a list of all its creditors, the amount of its debts and a detailed list of its assets.

6.12 Restructuring or Reorganisation Agreement

The proposed draft of a reorganisation plan must respect the ranking of privileges and securities of all creditors which will be bound by the plan. In the case of controlled management, the commissioner(s) must ensure that contractual clauses concerning expiration, resolution and penalties are invalid in relation to the plan.

6.13 Non-debtor Parties

The judgment approving the reorganisation plan is binding upon the merchant and his/her/its creditors, as well as on the co-debtors and guarantors.

6.14 Rights of Set-off

Based on the principle of equal treatment of creditors, the opening of bankruptcy proceedings prohibits the payment of any creditor's claim. Therefore, mandatory, legal or conventional set-off of debts, which were not certain, due and payable before the opening of the bankruptcy, is not allowed after the opening of the bankruptcy or during the hardening period. Indeed, one effect of the judgment declaring bankruptcy is that all undue debts become due.

Apart from debts that exist prior to the bankruptcy and become due because of it, exceptions exist for:

- legal set-off of unconnected debts arising from the same contract – such set-off is not prohibited during the hardening period, and it may also be declared by a court after the judgment declaring the bankruptcy, for reciprocal and fungible debts that became certain, liquid and due before the judgment;
- judicial set-off cannot be declared after the opening of the bankruptcy but it may be declared during the hardening period, subject to the fact that it is pronounced by a judgment which is res judicata; and
- set-off between debts deemed connected (*dettes connexes*) – such set-off is possible even if one of the debts arises after the opening of the bankruptcy.

Netting agreements with respect to claims or financial instruments are now allowed by the Luxembourg law of 5 August 2005 on financial collateral arrangements (Article 18) and such agreements remain enforceable regardless of the opening of Luxembourg or foreign insolvency proceedings against the defaulting party.

6.15 Failure to Observe the Terms of Agreements

In the case of failure to comply with the reorganisation plan, the debtor should file a petition in order to commence bankruptcy proceedings.

6.16 Existing Equity Owners

Existing equity owners may only be entitled to receive dividends if the distribution is not prohibited by the plan and will not compromise the chances of recovery of the company.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

Voluntary Proceedings

As explained in **2.1 Overview of Laws and Statutory Regimes** and **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**, some proceedings are solely opened on a voluntary basis, for example stay of payments, composition with creditors and controlled management. Such proceedings aim

at the reorganisation of the debtor in order to protect its business. Refer to **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership** for more information on the conditions, procedure and effects of such proceedings.

On the basis of a formal decision taken by the shareholders or partners of a commercial company, it is also possible to voluntarily cease trading.

Common causes for dissolution are:

- the achievement or termination of the business purpose; or
- the expiration of the business's fixed term of operation; or
- reasons related to partners: a partnership is dissolved following the death of a partner, a partner's ruin or the suspension of a partner's civil rights; or
- legal reasons specific to the legal form of the company according to corporate law (ie, major loss of net assets).

The decision to dissolve the business marks the beginning of the liquidation process. One or more liquidators will then be appointed, who will be responsible for the full liquidation process until the final general meeting which concludes the liquidation proceedings. Once the procedure is closed, the company is struck off the Trade and Companies Register.

Procedure
Dissolution may not occur without liquidation unless all the shares are held by one party. Liquidation entails combining the corporate assets or, where applicable, the debts, of the partners.

The managers/directors or members of the management board must convene an extraordinary general meeting to rule on the dissolution of the company. This general meeting must take place in the presence of a notary.

For the decision to liquidate the company to be considered valid, in the case of:

- a public limited company or a partnership limited by shares – the general meeting must convene at least half of the company's capital (present or represented); failing that, the directors will convene a second meeting that will validly take a decision no matter what proportion of the company's capital is represented. The decision must be approved by at least a two-thirds majority vote (whether at the first or second meeting); or
- a limited liability company, partnership or limited partnership – half of the partners, representing three quarters of the share capital, must approve the decision.

The general meeting will appoint the liquidator(s) and decide on the method of liquidation. If no liquidator is appointed, the persons in charge of managing the company before its liquidation will be considered the liquidators.

As soon as the company ceases trading, the managers/directors or, failing this, the liquidator must declare the cessation of trading to the various official bodies in order to cancel any existing permits/registrations (business permit, social security, VAT, taxes, trade register, etc).

Tasks and responsibilities of the liquidator(s)
Once the dissolution has taken place, the liquidator(s) will represent the company and will be responsible for carrying out its liquidation. The liquidator(s) takes control of the company and the management board/board of directors relinquishes its powers.

The liquidator must recover (ie, collect) funds owed to the company and realise (ie, sell) the dissolved company's assets in order to be able to pay off the company's debts and distribute any remaining funds to the partners/shareholders. To this end, liquidators may in particular:

- bring any legal action on behalf of the company;
- collect any payments;
- issue a release (*mainlevée*) with or without a payment receipt; and
- sell all the company's transferable securities, etc.

The liquidator is also responsible for acting as the company's legal representative.

Concluding liquidation proceedings
At the end of the liquidation, but before concluding proceedings, the liquidator must produce the liquidation accounts. An ordinary general meeting of shareholders/general meeting of partners must then be convened in order to approve these accounts. A date will be set for the final general meeting, at which the liquidation proceedings will be declared closed. A notary does not need to be present.

Involuntary Proceedings
Compulsory liquidation is usually ordered following an application by the public prosecutor. Compulsory liquidation can be ordered by the court if a commercial company subject to Company Law has pursued illegal activities, or has seriously infringed the provisions of, among other things, the Commercial Code, the domiciliation law or Company law.

There are three possible situations in which the court can order the compulsory liquidation of a company:

- at the request of one or more partners/shareholders;
- at the request of any interested party when the shares are held by one individual; or

- at the request of the public prosecutor for serious violations of the law.

The judgment ordering the liquidation marks the beginning of the liquidation procedure and provides for the appointment of an official liquidator. The liquidator is responsible for all the liquidation operations until the judgment closing the liquidation procedure. Once the procedure is closed, the company is struck off the Trade and Companies Register.

Procedure
In most cases, compulsory liquidation will be ordered following an application by the public prosecutor. The latter can request that the court orders the dissolution/liquidation of any Luxembourg company that:

- engages in activities which contravene criminal law; or
- seriously contravenes
  (a) the provisions of the commercial code; or
  (b) the laws on commercial companies; or
  (c) the provisions governing the authorisation to set up a business.

Where the infringements are deemed sufficiently serious, the court may order the liquidation of the company. The court will then appoint a liquidator and set the conditions for the liquidation.

Where the dissolution/liquidation is requested by a shareholder/partner, the latter must lodge a request for liquidation with the district court (*Tribunal d'arrondissement*) in the jurisdiction where the company is established. If the court accepts the reasons cited, it will order the liquidation of the company. The court will then appoint a liquidator and set the conditions for the liquidation.

Tasks and responsibilities of the liquidator(s)
Following the judgment ordering the liquidation, the liquidator(s) must:

- publish an extract of the judgment ordering the liquidation, as well as an extract of the judgment declaring the conclusion of the liquidation procedure, in the newspapers and in the electronic compendium of companies and associations (*Recueil électronique des sociétés et associations*) to notify third parties and allow them to file their debt claims;
- draw up an inventory and the opening balance sheet for the liquidation procedure;
- recover any money owed to the company and realise (sell) the dissolved company's assets;
- check the company's receivables;
- depending on the case:
  (a) distribute the assets among the various creditors; or
  (b) distribute any remaining funds (surplus on liquidation) to the partners/shareholders; or
  (c) file for bankruptcy; or
  (d) initiate legal proceedings; or
  (e) report any criminal offences to the public prosecutor's office; and
- submit the winding-up report to the judge who ordered the liquidation.

Concluding liquidation proceedings
The judge can then pronounce the judgment closing the liquidation procedure.

7.2 Distressed Disposals
During such proceedings, the designated liquidator(s) will be in charge of negotiating, executing and authorising the sale of assets of the business. The acquired asset will be free and clear of claims and liabilities.

7.3 Failure to Observe Terms of Agreed/Statutory Plan
This is not applicable under Luxembourg law, as there is no statutory plan in such proceedings.

7.4 Priority New Money During the Statutory Process
This is not applicable under Luxembourg law.

7.5 Insolvency Proceedings to Liquidate a Corporate Group
The notion of corporate group is not acknowledged by Luxembourg law, but the opportunity to appoint the same liquidator in all the companies of a group may be contemplated.

7.6 Organisation of Creditors or Committees
In both voluntary and compulsory liquidation proceedings, there are no specific rules for the organisation of creditors or the formation of committees.

7.7 Use or Sale of Company Assets During Insolvency Proceedings
Liquidators do not need any authorisation from the court for the use or sale of company assets during a voluntary or compulsory liquidation. However, depending on the content of their mission (stipulated within the articles of association or within the decision in which they were appointed), the liquidators may have to obtain authorisation from the shareholders' assembly to dispose of the assets of the company under liquidation process.

8. International/Cross-border Issues and Processes

8.1 Recognition or Relief in Connection with Overseas Proceedings
In accordance with EU Regulation 2015/848 of the European Parliament and of the Council dated 20 May 2015 on insol-

vency proceedings (replacing and recasting the previous EU Regulation 1346/2000 of 20 May 2000), if an insolvency proceeding is opened in another member state, it will automatically be recognised within the other member states (and in Luxembourg) if the "centre of main interest" (COMI) of the debtor is located in the EU.

Likewise, a foreign judgment declaring an insolvency proceeding will have universal effect in Luxembourg provided that there is a reciprocity agreement with the country where the insolvency proceedings have been opened. If not, the foreign judgment must first be recognised in Luxembourg through exequatur proceedings in order to give effect to the enforcement measures contained within the foreign judgment in relation to assets located in Luxembourg.

8.2 Co-ordination in Cross-border Cases

The EU Regulation 2015/848 introduces new co-operation rights between EU courts, including the possibility to enter into protocols or other arrangements with courts of other EU member states. Apart from this, Luxembourg courts have not entered into any protocol or arrangement with any other foreign courts.

However, when the assets of a debtor are located in Luxembourg, ancillary insolvency proceedings may be opened in Luxembourg if the main insolvency proceedings are pending in another EU member state (in accordance with the provisions of EU Regulation 2015/848).

8.3 Rules, Standards and Guidelines

Under Luxembourg private international law, insolvency proceedings opened in Luxembourg have extra-territorial effects. The EU Regulation 2015/848 on insolvency proceedings provides the main rules determining the jurisdiction and the governing law in cross-border cases within the EU.

8.4 Foreign Creditors

Under Luxembourg insolvency law, there are no specific rules concerning foreign creditors. However, the EU Regulation provides a standard claim form for creditors wishing to file a claim in any member states.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

A particular type of statutory officer appointed within a bankruptcy is the bankruptcy trustee (*curateur*). In a controlled management, depending on the complexity of the business, one or several commissioners (*commissaire*) will be appointed by the court.

9.2 Statutory Roles, Rights and Responsibilities of Officers

In a controlled management procedure, the commissioner(s) have extended rights of supervision and control over all the operations of the debtor. They draw up an inventory of the debtor's assets, and a statement of its assets and liabilities. They must prescribe the measures required both in the interests of the debtor and creditors, and cancel all fraudulent acts or payments of creditors. Finally, they are responsible for establishing a recovery or restructuring plan.

In bankruptcy proceedings, the bankruptcy trustee represents the interests of the debtor (who is not entitled to run his/her/its business), as well as those of the creditors, and administers the assets of the bankrupt party (an inventory of the assets must be prepared by the trustee). The trustee has a duty to manage the bankruptcy with all due diligence, under the supervision of a judge whose authorisation shall be requested by the trustee for certain transactions (eg, sale of assets). The trustee can be held liable for their management of the bankruptcy.

9.3 Selection of Officers

Statutory officers are appointed by the court and, in practice, they are usually selected from a list of attorneys registered with the Bar of Luxembourg and Diekirch. In a controlled management, the commissioner(s) may also be a creditor(s) (Luxembourg Grand-Ducal Decree of 24 May 1935, Article 12).

10. Advisers and Their Roles

10.1 Typical Advisers Employed

In Luxembourg, the most commonly used insolvency proceeding is bankruptcy; attorneys are therefore most typically employed as advisers.

10.2 Compensation of Advisers

Depending on who is employing the attorneys and the scope of their mission, they may be both employed and paid by the shareholder(s) of the debtor company, but represent in court the bankruptcy trustee who is defending the interests of the bankrupt company in a dispute. Or, they can act for and be paid by creditors of the bankrupt company in order to maximise the collection of their debts.

10.3 Authorisation and Judicial Approval

No authorisation or judicial approval is required for such employment. In addition, the court may appoint experts within the reorganisation proceedings, if needed.

10.4 Duties and Responsibilities

Attorneys should advise clients in compliance with their ethical rules. When a debtor is facing financial difficulties,

the role of the attorneys is to provide guidance and assess the judicial framework required by the debtor's situation.

11. Mediations/Arbitrations

11.1 Utilisation of Mediation/Arbitration

In insolvency law matters, the competent jurisdiction in Luxembourg is the commercial chambers of the district court. Alternative dispute resolution modalities are not used at all in Luxembourg insolvency law matters.

In the case of a dispute arising during insolvency proceedings, however, if the parties have previously agreed to arbitrate their dispute under a valid and enforceable arbitration clause, they may employ arbitration. Nevertheless, cost might be an issue as the bankruptcy of the company implies that it does not have sufficient cash.

11.2 Mandatory Arbitration or Mediation

See **11.1 Utilisation of Mediation/Arbitration** on this point.

11.3 Pre-insolvency Agreements to Arbitrate

If arbitration agreements have been entered into prior to the opening of insolvency proceedings, such agreements remain valid. However, arbitration proceedings can only be initiated to determine the amount of a possible claim (if arbitration proceedings are initiated against the bankrupt company). Payments would then be made only on the basis of the aforementioned waterfall, see **5.8 Statutory Waterfall of Claims**.

11.4 Statutes Governing Arbitration/Mediation

The New Code of civil procedure covers provisions related to arbitration (Articles 1224 to 1251) and mediation (Articles 1251-1 to 1251-24).

11.5 Appointment of Arbitrators

Priority is given to the arbitration agreement with regard to the appointment of arbitrators. However, if nothing is provided in the agreement, the New Code of civil procedure provides that three arbitrators shall be appointed, each party appointing its own arbitrator and the two appointed arbitrators appointing the third arbitrator.

If an issue is encountered in the appointment of an arbitrator (eg, a party fails to appoint an arbitrator), the president of the district court shall hand down an order appointing such arbitrator.

There are no specific rules in the New Code of civil procedure governing who can serve as an arbitrator, but an arbitrator/mediator should disclose any conflict of interest they may have.

12. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

12.1 Duties of Directors

In principle, managers are generally required to perform their duties in the best interests of the company, and the managers of a Luxembourg company are not liable for the debts incurred by that company. However, managers may be held liable if they failed to act in a prudent and diligent manner and caused damages to the company (contractual liability) or to third parties (tort liability).

In the context of a bankruptcy, managers may be criminally liable for negligent or fraudulent bankruptcy when they have failed to file bankruptcy within one month from the date of cessation of payments by the company.

The bankruptcy trustee may also initiate liability actions against the managers, when:

- they have seriously contributed by their fault to the bankruptcy of the company. The court may declare that they shall be prohibited from directly or indirectly practising any commercial activity, or any function as a manager, director, auditor or any position that implies undertaking commitments on behalf of a company;
- they are guilty of gross negligence which has contributed to the bankruptcy and there is a shortfall in the assets of the company such that all the creditors cannot be paid, in which case, the court may rule that the managers are liable for the outstanding debts of the company; or
- they have used the company to act in their own personal interest, used the company's assets as if they were their own, continued – in their personal interest – any loss-making activity that would inevitably lead the company into bankruptcy; in such cases, managers may be declared personally bankrupt by the court.

12.2 Direct Fiduciary Breach Claims

During bankruptcy proceedings, only the bankruptcy trustee can bring liability actions against managers responsible for fault and negligence described above (see **12.1 Duties of Directors**).

12.3 Chief Restructuring Officers

Chief restructuring officers are not used in the Luxembourg insolvency market.

12.4 Shadow Directorship

Luxembourg precedents have defined de facto directors as the persons who have taken over the decision-making power that belongs to persons responsible for management (duly appointed directors) and effectively exercised this power, even with the consent of the latter; or the persons who have insinuated themselves into the corporate organs and taken,

without any restraint, binding decisions for the company. Luxembourg case law does not differentiate between de facto and shadow directors, who will have the same responsibilities as a legally-appointed director of the company.

12.5 Owner/Shareholder Liability

Shareholders' liability is limited to their contribution to the company.

13. Transfers/Transactions That May Be Set Aside

13.1 Historical Transactions

Certain acts performed by the debtor during the suspect period (also called the hardening period and defined in **13.2 Look-back Period**) that could be detrimental to the rights of the creditors are automatically deemed null and void.

These include:

- any act relating to movable or immovable assets that the debtor may have disposed of for no consideration, or for a consideration where the sale price is clearly too low in relation to the value of the asset in question;
- all payments made, either in cash or by assignment, sale, off-setting or otherwise, in respect of debts that have not yet become due;
- all payments made in a form other than cash or commercial paper for debts due; and
- any mortgage or any other rights in rem granted by the debtor for debts contracted before the cessation of payments.

Other acts, however, are not automatically deemed null and void:

- certain payments made by the debtor in respect of debts due and all other acts subject to payment during the hardening period may be declared null and void if the third parties that received payment or dealt with the debtor were aware that it had ceased payments;
- validly-acquired rights of lien may be registered until the date of the declaration of bankruptcy. However, rights registered during the 10 days prior to the period of cessation of payments or subsequently, may be declared null and void if more than 15 days have expired between the date of the deed constituting the lien and its registration.

Finally, regardless of the date on which they occur, all acts or payments made fraudulently to creditors, ie, carried out by the debtor in full knowledge of their prejudicial impact on other creditors (eg, by decreasing the estate, by not respecting the preferential ranking of claims, etc) are deemed null and void.

These rules pertaining to the hardening period do not apply to financial guarantee contracts or future claims assigned to a securitisation entity.

13.2 Look-Back Period

The hardening period is the period between the date of cessation of payments (this date cannot precede the date of the judgment by more than six months) and the declaration of bankruptcy by the opening judgment.

13.3 Claims to Set Aside or Annul Transactions

An action seeking the annulment or declaration of invalidity of a transaction by the court may only be initiated by the bankruptcy trustee, representing the creditors, or – where applicable – by the commissioner(s).

14. Importance of Valuations in the Restructuring and Insolvency Process

14.1 Role of Valuations

Valuations are not used in the Luxembourg insolvency market; therefore this section is not relevant in the framework of Luxembourg insolvency law and the practice of this law.

14.2 Initiating a Valuation

See **14.1 Role of Valuations**.

14.3 Jurisprudence

See **14.1 Role of Valuations**.

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