Insolvency/bankruptcy

Luxembourg

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1 Who may insolvency proceedings be brought against?

The Grand Duchy of Luxembourg has several types of insolvency proceedings.

Two apply to traders (natural and legal persons):

1. Bankruptcy proceedings, governed by the Commercial Code (*Code de Commerce*), are used to liquidate the assets of a trader who has become insolvent and has lost creditworthiness.
2. Judicial reorganisation proceedings are a mechanism to allow a company in financial difficulty to reorganise itself to avoid bankruptcy. Its purpose is to preserve, subject to judicial review, the continuity of all or part of the assets or activities of the company.

The purpose of initiating judicial reorganisation proceedings may be:

- To obtain a grace period to allow the conclusion of an amicable settlement;
- To obtain the agreement of the creditors on the reorganisation plan;
- To allow the transfer by court order, to one or more third parties, of all or part of the assets or activities.

The judicial reorganisation procedure is open to:

- Commercial legal persons;
- Non-trading companies;
- Natural persons performing a commercial activity; and
- Craftspeople.

Finally, there are insolvency procedures specifically for notaries, credit institutions, insurance companies and collective investment companies (as these are specific to a professional category or business sector, they will not be described in this fact sheet).

2 What are the conditions for opening insolvency proceedings?

1. Bankruptcy

Bankruptcy proceedings are opened by the debtor filing for bankruptcy, by one or more creditors applying for the debtor's bankruptcy or by a court.

Traders must file for bankruptcy with the registry of the district court (*tribunal d'arrondissement*) responsible for commercial cases for the trader's domicile or registered office. This must occur within one month of the date when the bankruptcy conditions are met.

Where one or more creditors of the debtor decide to apply for the trader to be declared bankrupt, they must use a bailiff (*huissier de justice*) who, through a writ, orders the trader to appear before the district court responsible for commercial cases within eight days (fixed-date writ) so that a decision can be made on the merits of the bankruptcy application.

Bankruptcy proceedings can also be opened by a court based on the information available to it. In this case, the court must summon the bankrupt, through the court registry, to explain their situation to the court sitting in chambers.

Before declaring a trader bankrupt, the district court responsible for commercial cases must check whether the person or company in question meets the following three conditions:

- Status of trader: a natural person who carries out, as their usual profession (main or supplementary), acts described as commercial by law (e.g. the acts listed in Article 2 of the Commercial Code), or a legal person incorporated in one of the forms provided for by the amended Law of 10 August 1915 on commercial companies (*loi modifiée du 10 août 1915 concernant les sociétés commerciales*) (e.g. public limited company (*société anonyme*), private limited company (*société à responsabilité limitée*), cooperative (*société coopérative*), etc.) ;
- Cessation of payments: this means that unquestionable debts due for payment (e.g. wages, social security, etc.) are unpaid, with term or contingent debts and natural obligations not being sufficient; and
- Loss of creditworthiness: the trader can no longer obtain credit from banks, suppliers or creditors.

Although the refusal or inability to pay a single debt (regardless of the amount) that is unquestionable and due for payment is sufficient, in principle, to establish the state of cessation of payments, a simple cash flow problem does not imply the state of bankruptcy, provided that the trader can obtain the credit needed to continue trading and honour commitments.

2. Judicial reorganisation

Judicial reorganisation proceedings are initiated when the debtor lodges an application to the commercial district court. Such proceedings are therefore voluntary. However, judicial reorganisation by transfer, ordered by the court, may be imposed on the debtor, following an application by the State Prosecutor (*procureur de l'État*), the summons of a creditor, or any person with an interest in acquiring all or part of the company.

The conditions for initiating judicial reorganisation proceedings are as follows:

- Status as a trader or craftsperson: The judicial reorganisation procedure is open to traders, craftspeople and commercial companies.

- Threat to the company’s ability to continue as a going concern or financial difficulty: The company must be in financial difficulty which could lead to the cessation of payments. The financial difficulty must be sufficiently serious to justify judicial intervention, but the company must still have the possibility of recovery.

- Bankruptcy: The existence of a state of bankruptcy does not prevent the initiation or continuation of a judicial reorganisation. A company in bankruptcy may consider restructuring and thus avoid full liquidation.

- Previous reorganisation procedure: If the debtor has already benefited from a judicial reorganisation in the last three years, a new procedure is only possible if its purpose is to transfer all or part of the assets or activities of the company by a court order.

3. Over-indebtedness

Over-indebtedness of natural persons is described as the situation where the debtor domiciled in the Grand Duchy of Luxembourg is clearly unable to meet all their non-professional debts that are due and falling due for payment and to honour the commitment that they have made to jointly and severally guarantee or pay the debt of a sole trader or a company, provided that they have not been a director, in fact or in law, of that company.

The collective debt settlement procedure involves three stages:

- Agreed settlement, which occurs before the Mediation Commission for Over-Indebtedness (*Commission de*

médiation en matière de surendettement),
- Court-supervised reorganisation, which occurs before the magistrate's court (*juge de paix*) for the domicile of the over-indebted debtor,
- Personal recovery, also known as 'personal bankruptcy' (*faillite civile*), which occurs before the magistrate's court for the domicile of the over-indebted debtor.

It should be noted that the personal recovery stage, which is subsidiary to the other two stages in the collective debt settlement procedure, can be triggered only where the over-indebted debtor is in an irreparably compromised situation, which is described as the situation where the debtor cannot implement:

- the measures of the agreed settlement plan, or
- the measures proposed by the Mediation Commission as part of the agreed settlement, and
- the measures determined in the court-supervised reorganisation proceedings.

It should also be noted that applications for the agreed settlement procedure must be sent to the chair of the Mediation Commission.

An application form for the agreed settlement procedure can be downloaded from the https://justice.public.lu/fr.html website at the following address:

https://justice.public.lu/fr/creances/surendettement.html

In addition, creditors of the over-indebted debtor must file their claims with the Over-Indebtedness Information and Advice Service (*Service d'information et de conseil en matière de surendettement*). A form for filing claims can be downloaded from the www.justice.public.lu website at the following address:

https://justice.public.lu/fr/creances/surendettement.html

3 Which assets form part of the insolvency estate? How are the assets treated which are acquired by or which devolve on the debtor after the opening of the insolvency proceedings?

1. Bankruptcy

Once the bankruptcy order has been made, bankrupts are automatically divested of the right to administer any of their assets, even those that may devolve on the bankrupt following the bankruptcy order.

This divestment covers all the bankrupt's movable and immovable assets. This mechanism aims to protect the interests of the body of creditors.

Generally speaking, the trustee goes to the bankrupt's premises to draw up an inventory of the assets located there. In this respect, the trustee must differentiate between those assets that fully belong to the bankrupt and those over which third parties may assert various property rights.

When realising the movable and immovable assets, the trustee ensures that any assets of the bankrupt are sold in the best interests of the body of creditors. In order to sell those assets, the trustee needs authorisation from the court. The movable and immovable assets must be sold as laid down by the Commercial Code. The proceeds must be deposited in the bank account opened in the name of the insolvency proceedings.

2. Over-indebtedness

The court arranges for the debtor's financial and social situation to be assessed in order to verify the claims and value the assets and liabilities.

Having decided to open the personal recovery proceedings and having determined that there are assets to be liquidated, the court then proceeds with the liquidation of the debtor's assets.

The magistrate's court decides on any disputed claims and orders liquidation of the debtor's personal assets. Only furnishings needed for everyday life and non-professional assets essential for carrying out a professional

activity are excluded. The assets of the over-indebted debtor are liquidated in the personal recovery proceedings in accordance with the objective of the law, which is to improve the debtor's financial situation by allowing them and their household to lead a life in keeping with human dignity.

The debtor's rights and actions in relation to their assets are exercised throughout the liquidation by a court-appointed liquidator.

The liquidator has six months to sell the debtor's assets on an amicable basis or to organise a forced sale.

Effects of the personal recovery proceedings:

- Where the proceeds from the liquidation of assets are sufficient to satisfy the creditors, the court orders closure of the proceedings;
- Where the proceeds from the liquidation of assets are insufficient to satisfy the creditors, the court orders closure of the proceedings on the grounds of insufficient assets;
- Where the debtor has nothing other than the furnishings needed for everyday life and non-professional assets essential for carrying out a professional activity, the court orders closure of the proceedings on the grounds of insufficient assets;
- Where the assets have no market value or would cost a disproportionate amount to sell in relation to their market value, the court orders closure of the proceedings on the grounds of insufficient assets.

Closure due to insufficient assets has the effect of cancelling all the debtor's non-professional debts.

However, the following are excluded from the cancellation of the debtor's non-professional debts:

- debts that a guarantor or co-obligor has paid instead of the debtor;
- debts referred to in Article 46 of the Law, i.e. current payments of maintenance debts and monetary amounts awarded to victims of intentional acts of violence due to bodily injury suffered.

However, debts referred to in Article 46 of the Law can be cancelled where the creditor concerned has agreed to the remission, rescheduling or cancellation of the debts in question.

4 What powers do the debtor and the insolvency practitioner have, respectively?

1. Bankruptcy

Once the bankruptcy order has been made, bankrupts are automatically divested of the right to administer any of their assets, even those that may devolve on the bankrupt.

Following this order, administration of the debtor's assets is entrusted to a trustee.

Where the bankrupt is a legal person, the insolvency estate consists of all the company's assets and liabilities, not including rights that partners may have in that capacity.

Trustees are chosen from among those people who can offer the best guarantees in terms of the intelligence and accuracy of their management.

In practice, judges at the district court responsible for commercial cases choose trustees from the list of lawyers. However, in cases where this is required in the bankrupt's interests, the court can also appoint notaries or accountants/auditors.

As with all proceedings involving traders, the district court responsible for commercial cases has jurisdiction in terms of bankruptcy.

It is therefore the district court responsible for commercial cases that makes the bankruptcy order, determines the date of cessation of payments, appoints the various participants (official receiver, trustee), sets the date for claims to be filed and the date for the claim verification report to be completed, and orders closure of the bankruptcy proceedings.

Administration of the assets is entrusted to a court-appointed trustee who is responsible for realising the debtor's assets and distributing the proceeds between the various creditors, in accordance with the rules on preferential claims and charges on property.

The official receiver is responsible for supervising the bankruptcy operations, management and liquidation. During a hearing, they report on any disputes that may arise and order any urgent measures needed to secure and preserve the insolvency estate. They also chair any meetings of the bankrupt's creditors.

Once bankruptcy has been ordered, bankrupt traders are divested of the right to administer their assets and can no longer make any payments or carry out any transactions or other acts in relation to those assets.

2. Judicial reorganisation

In the framework of a judicial reorganisation, a court representative (*mandataire de justice*) is appointed at the request of the debtor where such a representative is necessary to achieve the objectives of the reorganisation. Once in office, their duties may vary depending on the specific needs of the debtor and the decision of the court. Their role may be limited to mere management assistance, or may extend to the preparation and facilitation of an agreement. As part of judicial reorganisation by transfer by court decision, the court representative is responsible for organising and carrying out the transfer in the name and on behalf of the debtor. Since each situation is unique, the responsibilities of the court representative are tailored to the circumstances and needs of the debtor.

A provisional administrator may be appointed where serious and proven misconduct on the part of the debtor or one of its bodies is established, at the request of any interested third party or the State prosecutor. Their role is then to replace the management of the company and to manage it for the entire duration of the grace period.

The debtor plays a proactive role in initiating the proceedings and drawing up and implementing the reorganisation plan, while collaborating with creditors and judicial authorities to restore the financial health of the company.

3. Over-indebtedness

As regards the debtor's obligations and the effect on the debtor's assets of opening the collective debt settlement procedure, it should be noted that the debtor is subject to a duty of good behaviour.

During the good behaviour period, the debtor must:

- cooperate with the authorities and bodies involved in the procedure by agreeing to provide spontaneously any information on their assets, income and debts, and any changes occurring in their situation;

- carry out, insofar as this is possible, a paid activity in line with their abilities;

- not worsen their insolvency and act dutifully to reduce their debts;

-not favour a particular creditor, except for maintenance creditors for current payments, landlords for current rent payments for housing meeting the debtor's basic needs, suppliers of goods and services essential for a dignified life, and creditors for current payments in relation to enforcement of the debtor's payment of damages awarded following intentional acts of violence due to bodily injury suffered; – honour the commitments made as part of the procedure.

Two types of body are involved depending on whether the procedure is at the agreed settlement or court stage.

The agreed settlement stage occurs before the Mediation Commission. The Mediation Commission's members are appointed by the Minister. It has a chair and a secretary, and it meets at least once a quarter. In order to be eligible for the Mediation Commission, applicants must submit a criminal record certificate, among other documents. Once appointed, members are under a legal obligation to inform the Minister of any criminal proceedings or convictions against them so that they can be replaced. The Mediation Commission's members receive an allowance of EUR 10 per session and its chair receives an allowance of EUR 20 per session.

The Mediation Commission decides in particular whether to accept applications for the procedure and whether

claims filed are admissible. It also approves or amends draft agreed settlement plans that are submitted to it following investigation by the Over-Indebtedness Information and Advice Service (hereinafter 'the Service').

If, within six months of the Commission agreeing to the procedure, the proposed plan has not been accepted by the interested parties, the Commission draws up a report recording the failure of the agreed settlement procedure. Within two months of the date when this report is published in the register, the debtor can initiate court-supervised reorganisation proceedings before the magistrate's court for their domicile. If the debtor does not make this application within the time-limit indicated, they can initiate a new collective debt settlement procedure only after two years have passed from the date when the report was published in the register.

If the court-supervised reorganisation stage is initiated, the parties will be summoned before the magistrate's court, which can require them to provide all the documents or information allowing the debtor's assets and/or liabilities to be established.

Based on the information submitted, the court draws up a reorganisation plan, which will include measures enabling the debtor to honour their commitments.

The reorganisation plan drawn up by the court applies for a maximum of seven years and may lapse in a limited number of cases (in particular where the debtor has not fulfilled their obligations under the reorganisation plan).

5 Under which conditions may set-offs be invoked?

1. Judicial reorganisation

It is possible to provide, in the framework of the reorganisation, that suspended claims (*créances sursitaires*) may not be offset against debts which the creditor might have towards the company after the approval of the reorganisation plan.

However, there are exceptions to this rule. It does not apply to related claims (claims which are linked to each other, for example under the same contract or transaction) or to claims which, under an agreement prior to the opening of the reorganisation procedure, could already be offset.

2. Bankruptcy

In terms of bankruptcy, it is settled case law that, after the bankruptcy order has been made, no legal, court-ordered or agreed set-off is possible any longer, even between pre-existing claims, if they lacked, up to that point, one of the three qualities of liquidity, payability and fungibility. Although the bankruptcy order can therefore prevent any legal set-off, it should not be inferred that this is absolute or retroactive. The bankruptcy order does not affect legal set-off where the conditions for this were met before the bankruptcy proceedings were opened. The Court of Appeal (*Cour d'appel*) has ruled that '*the suspect period does not prevent this type of set-off. Legal set-off is possible despite the cessation of payments. It is not an act of the debtor, as it occurs without their knowledge; Article 445 of the Commercial Code does not refer to it.* '

With regard to court-ordered set-off, this cannot be ordered after collective proceedings have been opened. However, this can occur during the suspect period, provided that the relevant order has become final (not open to appeal). In this case, set-off can have an effect only from the date of the order.

With regard to agreed set-off, this quite clearly cannot occur after collective proceedings have been opened. Moreover, it cannot occur during the suspect period, because it is regarded by Article 445 of the Commercial Code as an abnormal method of payment that is sanctioned by invalidity. [1]

However, it should be noted that the Law of 5 August 2005 on financial guarantees (*loi du 5 août 2005 sur les garanties financières*) provides for specific exceptions to the rules described above with regard, for example, to set-off agreements that may be concluded between parties on the day when insolvency proceedings are opened (or even after this – see Article 18 et seq. of the Law of 5 August 2005 on financial guarantees).

[1] 'La compensation comme garantie d'une créance sur un débiteur en faillite', Pierre HURT, J.T., 2010, p. 30

6 What effect do insolvency proceedings have on current contracts the debtor is a party to?

1. Bankruptcy

One of the main difficulties that arises for trustees after bankruptcy proceedings have been opened concerns current contracts concluded before the bankruptcy was ordered. Excluding employment contracts, which automatically end on the date when the bankruptcy is ordered (Article L.125-1 of the Labour Code (*Code du travail*)), it is traditionally accepted that current contracts continue until they are terminated by the trustee.

The trustee must weigh up the interests involved when deciding whether or not these contracts should temporarily continue. If there are clauses that provide for the termination of the contract in the event of bankruptcy of one of the parties, it should be decided whether or not the trustee intends to dispute the applicability of these clauses (bearing in mind that the validity of these clauses is debatable; for example, these clauses are regarded as invalid in Belgium in the context of commercial leases).

In any event, in principle, the trustee alone is responsible for choosing between performance or termination of these contracts. If the other contracting party disputes the trustee's decision and invokes the automatic termination of the contract due to bankruptcy, the trustee exposes themselves to legal proceedings with an uncertain outcome, and to the creation of new costs for the insolvency estate [1].

2. Judicial reorganisation

Where judicial reorganisation proceedings are initiated, the effects on ongoing contracts are regulated in such a way as to allow the company to continue its business so that it can effectively reorganise itself throughout the proceedings.

Going concern principle: As a general rule, the initiation of judicial reorganisation proceedings does not lead to the automatic termination of ongoing contracts. Ongoing contracts continue to exist, and the debtor may unilaterally decide whether or not to perform them where this is essential to maintain the business of the company during the reorganisation.

Penalty clauses: Penalty clauses intended to cover, on a flat-rate basis, any potential damage suffered as a result of non-compliance with the main commitment, are suspended during the grace period and until full implementation of the reorganisation plan. The creditor may, however, include in their suspended claim the actual damage suffered as a result of failure to comply with the main commitment.

Protection of employees: Employment contracts are not automatically terminated by the opening of the reorganisation proceedings. However, within the framework of the reorganisation plan, it may be necessary to make redundancies on economic grounds or to make changes to working conditions. These measures must be approved by the court and respect employees' rights.

[1] Sources: *Les procédures collectives au Luxembourg*, Yvette HAMILIUS and Brice HELLINCKX (authors of Chapter 3), Editions Larcier, 2014, p. 86.

7 What effect does an insolvency proceeding have on proceedings brought by individual creditors (with the exception of pending lawsuits)?

1. Bankruptcy

During bankruptcy proceedings, enforcement measures against traders and their assets are suspended. However, no legal text applicable in the Grand Duchy prevents creditors from taking measures designed to preserve the integrity of their debtor's assets.

In all these proceedings, debtors no longer have the freedom to dispose of their assets. 'From the bankruptcy order until closure of the proceedings, no legal action can be validly brought against the bankrupt alone, with regard to assets that form part of the insolvency estate'. (Lux. 12 January 1935, Pas. 14, p. 27) 'Unsecured creditors and those with a preferential claim are not entitled, during bankruptcy, to sue the bankrupt or even the

trustee to apply for an order against them, but may act only by way of a claim or an action for admission in order to have their claim recognised'. (Cass., 13 November 1997, Pas. 30, p. 265)

In certain cases, however, acts of disposal may still be carried out with the agreement of the person delegated by the district court responsible for commercial cases (with regard to suspension of payments or administration).

Moreover, the bankruptcy order renders debts not due as payable and interrupts the application of interest.

2. Judicial reorganisation

Provisional prohibition on realising movable or immovable assets: For the duration of the grace period, individual actions to assert suspended claims may not be pursued or brought against the movable or immovable assets of the debtor.

3. Over-indebtedness

In terms of collective debt settlement, the Mediation Commission's decision to accept the debtor's application automatically suspends any enforcement measures against the debtor's assets, except for measures relating to maintenance obligations, interrupts the application of interest and renders debts not due as payable.

If the agreed settlement stage fails, the magistrate's court before which the court stage will be heard can suspend any enforcement measures under the same conditions as indicated above.

8 What effect does an insolvency proceeding have on the continuation of lawsuits pending at the moment of the opening of the insolvency proceeding?

1. Bankruptcy

Litigation already in progress when the insolvency proceedings are opened can be validly continued by the trustee acting in that capacity. However, applicants must ensure that such cases are conducted lawfully by joining the trustee in the proceedings, because only the latter has the power to validly represent the bankrupt debtor.

Where the case goes against the debtor, the creditors who brought the proceedings prior to the bankruptcy obtain a security that they can use in the liquidation. However, this security cannot be enforced, as the bankruptcy order results in the debtor being divested of the right to administer any of their assets.

2. Judicial reorganisation

As soon as an application for judicial reorganisation is lodged, the law provides for protective measures to give the debtor the time needed to carry out efficient reorganisation, without being immediately under pressure from bankruptcy proceedings or seizures, with the aim of preserving the company's ability to continue as a going concern. To this end, the following measures are provided for:

Prohibition on declaring bankruptcy: As long as the court has not ruled on the application for judicial reorganisation, even if the application for bankruptcy has been brought or enforcement has been initiated, the debtor cannot be declared bankrupt. For companies, this also means that they cannot be dissolved judicially or be subject to administrative dissolution without liquidation.

Suspension of enforcement proceedings: No realisation of movable or immovable assets belonging to the debtor may be carried out following the use of an enforcement measure. This means that creditors cannot seize and sell the debtor's assets during the period when the request for judicial reorganisation is being dealt with by the court.

9 What are the main features of the participation of the creditors in the

insolvency proceeding?

1. Bankruptcy

Publication of the bankruptcy notice in one or more newspapers distributed in Luxembourg informs creditors that their debtor has gone bankrupt. They must then file their claims, together with their securities, with the registry of the district court responsible for commercial cases, within the time-limit set in the bankruptcy order. The court clerk records the claims and securities and provides a receipt.

Claims must be signed and must include the surname, forename, profession and address of creditors, as well as the amount of the claim, reasons for the claim, and any guarantees or securities associated with the claim. The various claims filed are then verified in the presence of the trustee, bankrupt debtor and official receiver.

During this procedure, if there are any disputes, creditors may be summoned to explain the details of their claim and its merits or exact amount during cross-examination.

If the trustee has been able to identify assets that can be distributed between the creditors, they summon the latter to a presentation of accounts meeting during which the creditors can give their opinion on the distribution plan.

If there are insufficient assets, closure of the bankruptcy is ordered.

If the trustee does not fulfil their duties to the satisfaction of the creditors, the latter can send their complaints to the official receiver who, as necessary, may replace the trustee.

2. Judicial reorganisation

The participation of creditors in judicial reorganisation proceedings through a collective agreement is a key element for the success of the reorganisation. The main elements of this participation are:

- Participation in negotiations: Creditors participate in negotiations regarding the terms of the reorganisation or restructuring plan. The plan may include proposals such as debt reductions (partial write-offs), rescheduling of payments or debt-to-equity conversions.
- Vote on the reorganisation plan: Creditors have the right to vote on the reorganisation plan proposed by the debtor. To be approved, the plan usually needs to obtain the agreement of a majority of creditors, often according to categories of claims (secured creditors, unsecured creditors, etc.). The details of the vote and the required majorities may vary depending on the type of procedure.
- Supervision of the plan’s implementation: Once the plan has been approved and endorsed by the court, creditors have a right of scrutiny over its implementation. The composition trustee (*commissaire au sursis*) may be given responsibility for overseeing the proper implementation of the plan and reporting to the creditors and the court. If the debtor fails to comply with the plan, creditors may request the intervention of the court.
- Intervention in the event of difficulties: If difficulties arise during the implementation of the plan, creditors may intervene to request that amendments be made to the plan or, in serious cases, that the reorganisation proceedings be converted into liquidation proceedings.
- Legal remedies and rights to challenge: Creditors may appeal against decisions that would be unfavourable to them, such as the validation of contested claims or the approval of the reorganisation plan. Such appeals must be exercised within the time limits and in the form laid down by law.

These elements are intended to ensure that creditors have a say in the reorganisation procedure by collective agreement and that their rights are protected while offering a chance of survival to the company in difficulty.

3. Over-indebtedness

In the first instance, during the agreed settlement stage, creditors must file their claims with the Over-Indebtedness Information and Advice Service. Creditors can then take an active part in the adoption of an agreed settlement plan by that Service.

The Mediation Commission for Over-Indebtedness then convenes the creditors and sets out the proposals made

in the agreed settlement plan. At least 60% of the creditors whose claims represent 60% of the body of claims must then state that they accept the agreed settlement plan in order for it to be regarded as accepted. No response from creditors is deemed to mean that they agree.

10 In which manner may the insolvency practitioner use or dispose of assets of the estate?

Trustees in a bankruptcy represent both the bankrupt person and the body of their creditors. In this dual capacity, they are not only responsible for administering the bankrupt's assets, but are also authorised to monitor, as claimants or defendants, all actions that seek to preserve the assets that must be used as security for the creditors, and also to recover or increase those assets in the common interests of the latter (Court of Appeal, 2 July 1880, Pas. 2, p. 49).

The trustee takes actions relating to the joint security of the creditors, represented by the bankrupt’s assets, i.e. actions to recover, protect or liquidate those assets. (Court of Appeal, 25 February 2015, Pas. 37, p. 483)

As regards current contracts following the bankruptcy order, the trustee must decide whether these should be terminated or whether it would be better, where they may release assets, to continue their performance with a view to subsequently meeting the bankrupt’s liabilities.

11 Which claims are to be lodged against the debtor's insolvency estate and how are claims arising after the opening of insolvency proceedings treated?

1. Bankruptcy

All creditors must declare their claims, regardless of the nature of the claim and whether or not they have a preferential claim. However, claims arising from the estate, i.e. those claims arising subsequently and in the interests of the bankruptcy proceedings (e.g. trustee’s costs, rent falling due after the bankruptcy order, etc.) are exempt from this procedure.

As regards claims that arise from the estate after the opening of the insolvency proceedings and that result from the administration of the bankruptcy or the continuation of certain activities of the bankrupt business, these are honoured first before the rest of the assets are distributed among the body of creditors. Claims arising from the estate are therefore honoured in all cases before those of other creditors.

2. Judicial reorganisation

In the framework of judicial reorganisation proceedings, claims to be lodged against the debtor’s liabilities are those arising before the opening of the judicial reorganisation proceedings. The debtor must attach to their application a complete list of outstanding creditors, whether acknowledged or claiming such status, including their names

Claims arising after the opening of the judicial reorganisation proceedings, i.e. claims arising during the judicial reorganisation, are generally given special treatment. Claims relating to services provided to the debtor during the judicial reorganisation proceedings, whether arising from new commitments entered into by the debtor or from contracts pending at the initiation of the proceedings, are regarded as ‘debts of the estate’ in the event of bankruptcy, liquidation or transfer by court order. For these claims to be regarded as debts of the estate in subsequent collective proceedings, there must be a close link between the end of the judicial reorganisation proceedings and the initiation of the collective proceedings (such as bankruptcy). This link is presumed to exist if the collective proceedings are opened within 12 months of the end of the judicial reorganisation.

Distribution of compensation: The compensation claimed by the creditor as a result of the termination of a contract or its non-performance is distributed proportionally according to its relationship with the period before or after the opening of the judicial reorganisation proceedings. This means that if a contract is terminated during the reorganisation proceedings, the part of the compensation that relates to the period after the initiation of the reorganisation will be treated differently from that relating to the previous period.

Priority of payment on assets encumbered by rights in rem: Claims arising from benefits which have contributed to the maintenance of the security or of ownership (such as assets over which a creditor has a right in rem) are prioritised for payment. This means that the proceeds from the sale of these assets will be used as a matter of priority to repay these specific claims.

12 What are the rules governing the lodging, verification and admission of claims?

1. Bankruptcy

In bankruptcy proceedings, the bankruptcy order will be published in various ways (press, registration with the commercial court) so that the situation is brought to the attention of the bankrupt debtor's creditors, who can then make themselves known (Article 472 of the Commercial Code).

Creditors must then file their claim with the registry of the district court responsible for commercial cases and submit their supporting documents (Article 496 of the Commercial Code).

A form enabling creditors to make this claim declaration is available online at the following address: https://justice.public.lu/fr/creances/declaration-creance.html

Claims are verified by the trustee responsible for the liquidation and may be disputed by the latter (Article 500 of the Commercial Code).

Any claim filed that is disputed is referred to the court.

However, if, due to their nature, disputes fall within the jurisdiction of a court other than the district court responsible for commercial cases, they will be referred back to the court having jurisdiction to rule on the substance of the case. In the meantime, the district court responsible for commercial cases remains competent, pursuant to Article 504, to determine the amount up to which the disputed creditor may participate in the deliberations.

2. Judicial reorganisation

The debtor must attach to their application a complete list of outstanding creditors, whether acknowledged or claiming such status, indicating their name, address, and the amount of their claim, with specific mention of any status as extraordinary outstanding creditors and of any assets encumbered by a charge secured on movable property or a mortgage, or that are owned by the creditor.

Disclosure obligation: The debtor must inform each creditor individually of the judgement within 14 days of the judgment being handed down. This ensures that all creditors are aware of the situation and can act accordingly.

Consulting the list of creditors: Creditors have the right to consult the list of creditors lodged at the Registry, in accordance with the rules laid down in law. This list contains details of all claims against the company, allowing creditors to verify their own position.

Right to challenge: Any creditor or claimed creditor may challenge the amount or the classification of their claim as stated by the debtor. This includes disputing the class (ordinary or extraordinary) to which the creditor has been assigned by the debtor.

Dispute Procedure: If the creditor and the debtor fail to reach agreement, the dispute may be brought before the court which initiated the judicial reorganisation proceedings.

Modification of claims: The court may, at the joint request of the creditor and the debtor, change the amount or classification of the claim initially determined by the debtor. That decision is notified to the creditor by the Registry.

Deadline for challenges: If the creditor does not bring its challenge before the court one month before the hearing, they shall be deemed to accept the amount proposed by the debtor and may vote only up to that amount.

Dispute regarding the list of creditors: Any suspended claim included in the official list of claims may be contested by any interested party. The action is directed against the debtor and the creditor whose claim is contested. The court, after a report from the delegated judge, hears the parties concerned and decides on the dispute.

Jurisdiction of the court: If the dispute exceeds the jurisdiction of the court responsible for reorganisation, the latter may provisionally determine the amount and status of the claim for judicial reorganisation operations, pending a decision on the substance of the case by the competent court. If the decision on the dispute cannot be delivered quickly, the court may also provisionally determine the amount and status of the claim. The judgment provisionally fixing the amount and status of the claim is not open to appeal, meaning that it cannot be disputed.

Modification in the event of necessity: At the request of the debtor or a creditor, the court may, at any time and where absolutely necessary, modify its decision regarding the amount and status of a suspended claim, based on new information

Updating the list of creditors: The debtor must correct or complete the list of creditors if necessary and file it with the Registry before the scheduled hearing. The Registrar is then responsible for notifying such changes to the creditors concerned.

3. Over-indebtedness procedure

Within one month of the publication of the collective debt settlement notice in the register, creditors of the over-indebted debtor must file their claims with the Over-Indebtedness Information and Advice Service.

The claim declaration must comply with Articles 6 and 7 of the Grand-Ducal Regulation of 17 January 2014 implementing the Law of 8 January 2013 on over-indebtedness (*Règlement grand-ducal du 17 janvier 2014 portant exécution de la loi du 8 janvier 2013 concernant le surendettement*).

A form for filing claims can be downloaded from the https://justice.public.lu/fr.html website at the following address: https://justice.public.lu/fr/creances/surendettement.html

The Mediation Commission analyses whether the claims are admissible.

13 What are the rules governing the distribution of proceeds? How are claims and the rights of creditors ranked?

The basic principle in bankruptcy law is that each creditor must receive an identical share proportional to the amount of their claim.

Some creditors with a security or preferential claim are paid first.

Secured creditors are ranked in a legal order that is public policy (property landlords, mortgagees, creditors with securities over the business capital and, in particular, the public treasury in the broadest sense).

In general, the trustee refers to Articles 2096 to 2098, 2101 and 2102 of the Civil Code (*Code civil*).

The trustee must verify each claim by referring to the law and case law.

The net assets available to unsecured creditors must be distributed on a pro rata basis in accordance with Article 561, first paragraph, of the Commercial Code.

Once the trustee knows the amount of the fees set by the court, has ranked the secured creditors and knows the amount left to be distributed between the unsecured creditors, they draw up an asset distribution plan that is submitted in the first instance to the official receiver. In accordance with Article 533 of the Commercial Code, the trustee invites all creditors to the presentation of accounts meeting by registered letter, to which is attached a copy of the asset distribution plan.

The bankrupt must be served notice of the meeting by a court officer, or by publication in a Luxembourg newspaper.

Unless the presentation of accounts by the trustee is disputed by a creditor, the trustee submits the minutes of the presentation meeting, based on the asset distribution plan, to the official receiver and the court clerk for signature.

Following the presentation of accounts, the trustee pays the creditors.

14 What are the conditions for, and the effects of closure of insolvency proceedings (in particular by composition)?

1. Bankruptcy

In bankruptcy proceedings, when the payments have been made, the trustee can apply for the proceedings to be closed, which is followed by the closure order that, as its name suggests, ends the bankruptcy proceedings.

Under Article 586 of the Commercial Code, bankrupts who pay in full all sums owed in terms of principal, interest and costs can be discharged by submitting an application in this respect to the Supreme Court of Justice (*Cour supérieure de justice*).

2. Judicial reorganisation

Judicial reorganisation proceedings by collective agreement can be closed under several conditions, usually depending on the success or failure of the reorganisation. The main conditions are as follows:

Full implementation of the reorganisation plan: The proceedings may be closed when the judicial reorganisation plan has been successfully implemented. This means that the measures planned to restructure the company and repay creditors have been implemented in accordance with the plan approved by the court and accepted by the creditors.

Non-performance or failure of the plan: If the reorganisation plan cannot be implemented, or if the company fails to meet the commitments made under that plan, the judicial reorganisation proceedings may be closed. In this case, the proceedings may be converted into liquidation proceedings if the financial situation of the company does not allow it to continue operating.

Withdrawal or discontinuation of the debtor: The debtor may request the closure of the reorganisation proceedings if they consider that the continuation of the proceedings is no longer necessary or that they have managed to restore their financial situation without the need to continue the proceedings.

Full payment of creditors: Closure is also possible if the debtor is able to repay in full the creditors involved in the proceedings, including claims arising before and after the opening of the reorganisation proceedings.

Lack of reorganisation prospects: If, after analysis, it becomes apparent that the company cannot be reorganised, the court may decide to close the proceedings in order to open liquidation proceedings.

Effects of the closure of the judicial reorganisation proceedings

The closure of the judicial reorganisation proceedings has several legal and economic effects for both the debtor and the creditors:

Lifting of suspension measures: The closure of the proceedings puts an end to the protection measures enjoyed by the debtor, such as the suspension of individual enforcement actions and the prohibition of seizures. Creditors then recover their right to sue the debtor individually to recover their claims, subject to any agreements or moratoria put in place within the framework of the reorganisation plan.

Return of control: If the company’s management had been entrusted to a provisional administrator, the closure of the proceedings entails the return of control to the debtor.

End of the effects of the reorganisation plan: If the reorganisation plan has been fully implemented, the closure confirms that the commitments made under the reorganisation plan have been complied with, and the creditors concerned by the plan can no longer claim any additional payment in respect of the claims dealt with in the

proceedings.

15 What are the creditors' rights after the closure of insolvency proceedings?

1. Bankruptcy

Following closure of the insolvency proceedings, if there are any assets, creditors receive the full amount or a proportion of the amount of their claim in accordance with the distribution conditions accepted in the closure order.

Creditors can also bring an action based on Articles 1382 and 1383 of the Civil Code to invoke the general legal liability of directors of the bankrupt, or an action based on Articles 441-9 and 710-16 of the Commercial Companies Law (*loi sur les sociétés commerciales*) (liability of administrators and managers in the performance of their mandate).

2. Judicial reorganisation

If the judicial reorganisation proceedings have been closed due to the successful implementation of the reorganisation plan:

Payment of claims according to the plan: Creditors retain the right to receive payments in accordance with the terms of the reorganisation plan. If the plan provides for payment deferrals, debt reductions, or other terms, the creditors must comply with those provisions.

Recovery of remaining claims: If the plan did not provide for a full discharge of the claim, creditors may continue to recover the remaining amounts in accordance with the schedule set out in the reorganisation plan.

Limited remedy: Creditors who have accepted or were forced by the court’s decision to accept the plan cannot sue the debtor for the amount of the claims that has been cancelled or reduced under the plan. They can only claim what is provided for in the plan.

Rights in the event of failure of the reorganisation and conversion into liquidation

If the reorganisation proceedings have been closed due to the failure of the plan and the conversion into liquidation:

Participation in the liquidation: Creditors have the right to participate in the liquidation proceedings following the conversion. They must lodge their claims in this new procedure if they have not already done so.

Classification of claims: Claims are classified and satisfied according to their priority ranking, respecting privileges and guarantees. Secured creditors, such as mortgage creditors or employees, are paid as a matter of priority out of the proceeds from the liquidation of the assets.

16 Who is to bear the costs and expenses incurred in the insolvency proceedings?

1. Bankruptcy

The costs of the bankruptcy application are included in the costs of the insolvent estate.

As these are costs that arise in the interests of the bankruptcy proceedings, they are paid from the bankruptcy assets before the trustee distributes the remainder of the assets to the various creditors.

The Law of 29 March 1893 on legal aid and deficit proceedings (*loi du 29 mars 1893 concernant l’assistance judiciaire et la procédure en débet*) sets out, in Articles 1 and 2, the various costs that may result from formalities required by insolvency proceedings and determines the order of their payment where there are insufficient assets.

The competent district court sets the trustee's fees based on the Grand Ducal Regulation of 18 July 2003 (*règlement grand-ducal du 18 juillet 2003*).

The trustee must submit a statement of costs and fees to the district court responsible for commercial cases based on the assets recovered.

Article 536-1 of the Commercial Code provides, in its second paragraph, that the costs and fees of bankruptcies closed due to insufficient assets will be advanced by the Office of Indirect Taxes (*Administration de l'Enregistrement*) under the conditions laid down by the Law of 29 March 1893 on legal aid and deficit proceedings.

2. Judicial reorganisation

The main responsibility for the costs and expenses of the judicial reorganisation proceedings lies with the debtor, i.e. the company in difficulty.

Fees of legal representatives: The fees of legal representatives, such as the court-appointed administrator, the composition trustee, or the liquidator, are payable by the debtor. These fees are generally fixed by the court and are paid primarily from the debtor's assets.

Court fees: The court fees, including the costs associated with hearings, court decisions and other court fees, are also to be borne by the debtor.

17 What are the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors?

1. Bankruptcy

The bankruptcy order can set the date of cessation of payments by the bankrupt at a date prior to that of the order. However, this date cannot precede the order by more than six months.

To protect the interests of creditors, the period between the cessation of payments and the order is regarded as the 'suspect period'.

Certain acts carried out during this period, where they may be detrimental to the rights of creditors, will be null and void. They are:

- any acts in relation to movable or immovable property that the bankrupt has transferred without payment or for consideration where the sale price is clearly much lower than the value of the property in question;
- all payments made in cash or by transfer, sale, offsetting or otherwise for debts that have not yet fallen due;
- all payments made other than in cash or using commercial instruments for debts falling due;
- any mortgage or any other property rights granted by the debtor for debts contracted before the cessation of payments.

For other acts, however, the principle of nullity is not automatic.

As a result, certain payments made by the bankrupt for debts falling due and any other acts carried out for consideration during the suspect period may be voided if it is proven that the third parties who received the payments or who negotiated with the bankrupt were aware of the cessation of payments.

When a creditor knows that a debtor is unable to honour commitments, that creditor must not seek to be treated preferentially to the detriment of the general body of creditors.

Mortgage and preferential rights that have been validly acquired may be registered up to the date of the bankruptcy order. However, rights registered in the 10 days preceding the date of cessation of payments or thereafter may be declared null and void if more than 15 days have passed between the date of the mortgage deed and the date of registration.

Lastly, any acts carried out or payments made in fraud of creditors, i.e. done by the debtor in full knowledge of the detriment that this would cause to the creditor (i.e. by reducing the insolvency estate, not respecting the ranking of claims, etc.) are deemed null and void, regardless of the date on which they occurred.

The suspect period concept does not apply to financial guarantee contracts or in cases of future claims transferred to a securitisation body.

2. Over-indebtedness

The judge can, where applicable, appoint persons responsible for providing social, educational or financial management assistance to ensure that the part of the debtor’s income that is not allocated to repay debts is used for the purposes for which it is intended.

In carrying out their work, these persons are authorised to take any measures designed to prevent this part of the income from being diverted from its natural purpose or the interests of the debtor’s household being harmed.

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