



Restructuring and Insolvency

in 51 jurisdictions worldwide

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Luxembourg

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1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

The following insolvency procedures are available for non-regulated companies in Luxembourg:

- bankruptcy, governed by articles 437 to 592 of the Luxembourg Commercial Code (LCC);
- controlled management, governed by the grand-ducal decree of 24 May 1935;
- suspension of payments, governed by articles 593 et seq of the LCC;
- composition with creditors (composition with creditors) governed by the Law of 14 April 1886; and
- the Law of 10 August 1915 on Commercial Companies, as amended, which governs both voluntary and involuntary (compulsory) liquidation (the Law on Commercial Companies).

The suspension of payments and the composition with creditors are rarely used these days and the most common procedure applicable to companies that are unable to meet their obligations towards their creditors is bankruptcy. Controlled management is available in the event that there is a chance of recovery for the company by organising a proper liquidation.

Under Luxembourg law, the word 'insolvent' is a generic word, and the expression 'insolvency proceedings' means collectively all insolvency proceedings that are available under Luxembourg law. The above-mentioned insolvency proceedings of bankruptcy, controlled management and composition with creditors are insolvency proceedings in the meaning of EC Regulation No. 1346/2000 on Insolvency Proceedings. The 'suspension of payments' procedure is not an insolvency proceeding in the meaning of the above EC Regulation.

2 Excluded entities

What entities are excluded from general bankruptcy proceedings and what legislation applies to them?

Public entities and individuals who are not considered as traders are excluded from general insolvency procedures. Regarding the latter, they are governed by the Law of 8 December 2000 on Excessive Debt.

In addition, specific reorganisation or liquidation procedures apply to regulated entities, such as banks, other professionals of the financial sector, investment funds and insurance companies, pursuant to particular rules and specific provisions for reorganisation and liquidation contained in the following applicable laws:

- the Law of 5 April 1993 on the Financial Sector, as amended;
- the Law of 20 December 2002 relating to Undertakings for Collective Investment, as amended;
- the Law of 13 February 2007 relating to Specialised Investment Funds, as amended; and
- the Law of 6 December 1991 on the Insurance Sector, as amended;
- the Law of 22 March 2004 on Securitisation, as amended.

This country report for Luxembourg does not deal with the reorganisation or liquidation procedures that specifically cover regulated entities in Luxembourg.

3 Secured lending and credit (immoveables)

What principal types of security are taken on immoveable (real) property?

The main type of security on immoveable property is the mortgage, which is governed by articles 2092 et seq of the Civil Code, the Law of 25 September 1905 on the Transcription of Rights In Rem and the Law of 18 April 1910 on the Mortgage Regime.

The mortgage allows the lender or mortgagee to have the real estate sold in a public auction upon a default of the borrower or debtor and to use the proceeds to repay the outstanding secured debt.

The priority of mortgages may be affected by the existence of *privilèges*, and foremost the *privilège du vendeur* and the *privilège du prêteur*. The former is in respect of any part of the sale price remaining due from a buyer after completion of the sale whereas the latter is for monies due to a lender if they were intended for the acquisition of an immoveable property and the sale agreement proves that they were used for that purpose. Such *privilèges* take priority over registered mortgages provided that they are registered with the Mortgage Registration Office.

Finally, Luxembourg law also provides for *hypothèques occultes* in favour of tax and social security authorities with respect to outstanding tax and social debts. These special mortgages are generally not registered with the Mortgage Registration Office.

4 Secured lending and credit (moveables)

What principal types of security are taken on moveable (personal) property?

The most common form of security under Luxembourg law on moveable assets are:

- the pledge;
- the transfer of title or ownership as security; and
- the retention of title.

The pledge can be granted over most categories of assets, including shares, intangible and future assets and fungible goods. The pledge is created by way of transfer of possession, whether actually or constructively, of the assets in respect of which the pledge is granted. The ownership of the assets remains with the pledgor or debtor. When pledging intangible moveables, the transfer of possession is usually deemed to take place by means of a notification or registration (perfection).

In addition to the regime provided by the Civil Code and the LCC, the Law of 5 August 2005 on Financial Collateral Arrangements instituted a special regime for collateral (ie, financial instruments such as shares, bonds, loan notes and claims related thereto).

Moveable assets may also be secured by way of transfer of title or ownership as security. The asset becomes the property of the transferee to secure the relevant obligation of the transferor and generally includes an undertaking of the transferee to retransfer the asset, except in the event of a total or a partial non-performance of the transferor's relevant obligation. The above-mentioned Law on Financial Collateral Arrangements instituted a special regime with respect to the transfer of title to collateral for security purposes.

A retention of title clause allows the vendor of a non-fungible moveable asset to remain the owner of this asset until full payment of the price by the purchaser. In bankruptcy proceedings (articles 567-1 et seq of the LCC), the seller may recover the asset within three months following the latest of the publications of the bankruptcy judgment if: the asset can be recovered in its original state; it has been incorporated in another asset; it can be extrapolated without any damage to the latter asset; or the goods have been sent to the purchaser and have not yet been sold by it. If the goods have been sold by the purchaser prior to the bankruptcy judgment, the supplier has a right over the sale value of the goods as long as the third party has not paid for them. As such, the supplier must claim for the payment of the outstanding amount within the above period of three months.

The retention of title clause must be agreed upon in writing, at latest on the delivery of goods or at the first delivery in the event of a series of deliveries.

5 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Prior to the opening of bankruptcy proceedings, an unpaid creditor, whose claim is certain and due for payment, may initiate attachment proceedings on the debtor's moveable and immoveable assets. The process must, however, be completed before the bankruptcy adjudication, as all enforcement proceedings are suspended as of the day of the bankruptcy judgment.

As of the bankruptcy adjudication, unsecured creditors and creditors with a general priority right are no longer permitted to take any action based on title to moveables and immoveables, nor any enforcement action against the bankrupt company's moveable or immoveable assets. Similar rules apply in other insolvency procedures. If the attachment procedure has not been validated by a conclusive or final judgment before the opening of the bankruptcy procedure against the debtor, the goods or funds that have been attached or seized cannot be transferred to the benefit of the unsecured creditor having made the attachment, but these goods or funds remain available to the general body of all unsecured creditors.

Although attachment proceedings on moveable assets are generally quite straightforward, they can prove to be time-consuming if disputed by the debtor. Attachment proceedings on immoveable assets are formalistic, complex and time-consuming.

No special procedures apply to foreign creditors, except that they may be obliged to produce security for costs if they are coming from certain countries outside the EU.

6 Courts

What courts are involved in the bankruptcy process? Are there restrictions on the matters that the courts may deal with?

Luxembourg district courts, sitting in commercial matters (Luxembourg or Diekirch – this depends on the domicile or registered office of the debtor) have exclusive jurisdiction to open insolvency proceedings against companies that have their effective registered office or their centre of main interests in Luxembourg, and traders who have their domicile within the district of the court.

In addition, according to EU Regulation No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, the aforementioned courts may also have jurisdiction to open secondary proceedings against foreign companies with an establishment in Luxembourg, if main proceedings have been opened by a European court in another jurisdiction.

The Luxembourg District Court, sitting in commercial matters, which has opened the insolvency proceedings over a debtor, will have, as a consequence of the opening of such proceedings, exclusive jurisdiction over all matters relating to and directly arising out of the insolvency procedure (*actions nées de la faillite*), such as disputes related to the lodging, verification and admission of creditors' claims and actions relating to the voidability of detrimental acts and clawback actions.

Disputes in relation to labour law claims and tax matters arising in the course of bankruptcy proceedings are generally assigned to the relevant courts. All ordinary civil and commercial matters that do not specifically relate to or arise out of the insolvency procedure shall remain subject to ordinary jurisdiction rules.

7 Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation and what are the effects?

Voluntary liquidation in the meaning of voluntary winding-up proceedings resolved by the shareholders is governed by articles 141 et seq of the Law on Commercial Companies. In the absence of any agreement to the contrary, the method of liquidation and appointment of the liquidators are determined by the general meeting of the shareholders.

A voluntary liquidation is also conceivable in the event of controlled management proceedings and more precisely if the procedure may enhance an orderly realisation of the company's assets in the best interest of all creditors (see question 9).

Pursuant to article 141 of the Law on Commercial Companies, as amended, commercial companies shall, after dissolution, be deemed to exist for the purpose of their liquidation. Pursuant to articles 144 and following of the same law, the liquidators may bring and defend any court actions on behalf of the company, receive any payments, grant releases, realise security, compromise on any disputes, dispose of the property of the company, and, but only with the authorisation of the general meeting of shareholders, continue an industrial or commercial activity, borrow monies, issue negotiable instruments with the purpose of optimising the liquidation, and the potential liquidation surplus is returned to shareholders.

Without prejudice to the rights of creditors benefiting from special security, the liquidators shall pay off all the debts of the company, and, after the payment or the deposit in escrow of the sums necessary for payment of the debts, the liquidators shall distribute to the shareholders the amounts or assets that remain available.

As a matter of law, voluntary liquidation is only conceivable if all the creditors can be paid in full. A voluntary liquidation procedure does not exclude a subsequent compulsory liquidation procedure or a bankruptcy procedure, if the legal conditions for such compulsory proceedings are met.

8 Involuntary liquidations

What are the requirements for creditors placing a debtor in involuntary liquidation and what are the effects?

A compulsory liquidation of a non-regulated company may only be instigated at the request of the public prosecutor. According to article 203 of the Law on Commercial Companies, the district court may, at the request of the public prosecutor, order the dissolution and liquidation of a company governed by Luxembourg law that pursues activities contrary to criminal law or that seriously contravenes the provisions of the LCC or the laws governing commercial companies, including those governing business licences.

Unpaid creditors may instigate bankruptcy proceedings against their debtor, but not compulsory liquidation proceedings. However, it is conceivable that creditors inform the public prosecutor's office that they are facing a debtor who is no longer complying with the provisions of the LCC or the provisions of the law governing commercial companies, and that they ask the public prosecutor to consider an application for compulsory liquidation of that specific debtor.

Upon ordering the liquidation, based on the application made by the public prosecutor, the commercial court will appoint a supervisory judge and one or more liquidators. It shall determine the method of liquidation, and it may decide that the rules governing the liquidation of a bankruptcy procedure shall apply. The method of liquidation may be changed by subsequent decisions, either based on the court's own motion or at the request of the liquidators.

In most compulsory liquidation cases, the commercial court renders applicable the rules that normally apply to bankruptcy proceedings, and as a consequence, the process of the liquidation and the manner in which the creditors claims will be dealt with will be similar to bankruptcy proceedings.

Pursuant to the law, a creditor cannot place its debtor in compulsory liquidation. However, a creditor can apply for the opening of bankruptcy proceedings against its debtor.

Pursuant to article 442 of the LCC, the district court, sitting in commercial matters, may open bankruptcy proceedings against a debtor based on an application made by one or more creditors. When applying for the opening of bankruptcy proceedings against its debtor, the creditor must establish that the two legal tests for bankruptcy are met. The criteria for bankruptcy are cessation of payments and loss of credit-worthiness (see question 11).

If the district court decides to open bankruptcy proceedings over a debtor, it will appoint a supervisory judge and one or more bankruptcy receivers. It will determine the period of cessation of payments, which may go back up to six months prior to the opening of the proceedings. The suspect period is mainly relevant for the determination of clawback actions pursuant to articles 445 and 446 of the LCC.

Pursuant to article 444 of the LCC, any payments, operations and acts realised or made by the debtor, and all payments made to the debtor since the opening of the bankruptcy procedure are void and of no effect. Pursuant to article 450 and following of the LCC, the opening of the bankruptcy proceedings triggers any acceleration clauses (ie, clauses that allow the lender to demand payment in full upon the happening of certain events). Interest running on ordinary claims, not secured by a pledge or a mortgage, is suspended as regards the general body of creditors of the bankruptcy. Similarly, any enforcement actions, whether against moveable or immovable property, will be suspended and can no longer be pursued. All the creditors are obliged to file proofs of debt in the liquidation of the bankruptcy proceedings, which need to undergo a verification process organised by the bankruptcy receiver together with the court. The bankruptcy receiver will realise the assets of the company and pay dividends to ordinary creditors, as far as monies for unsecured claims will remain available.

An involuntary liquidation can also occur as a consequence of a dispute among shareholders, where for example, minority or majority shareholders take court action against the other shareholders and against the company for the compulsory liquidation of the company on serious grounds. A serious dispute among shareholders can be seen as a serious ground. If a liquidation procedure over the company is opened, the court will also appoint a liquidator and determine the liquidation method. The legal basis for such a court action is article 1871 of the Civil Code. This specific court action is open to shareholders only, and not available to creditors.

9 Voluntary reorganisations

What are the requirements for a debtor commencing a financial reorganisation and what are the effects?

A financial reorganisation may be achieved through the controlled management procedure governed by the grand-ducal decree of 24

May 1935, or through the composition with creditors governed by the Law of 14 April 1886. Both procedures are optional procedures, that is, with no obligation for the company's directors to start or undertake such a procedure in case of financial difficulties.

As indicated above, the composition with creditors is very rarely used, and the most common reorganisation procedure available under the law is controlled management.

Controlled management is available to debtors, physical persons (traders) or companies, who no longer have credit-worthiness (can no longer obtain credit), or for whom the complete execution of their engagements is compromised. There is no obligation for a debtor who wants to apply for this protection to have sufficient assets to satisfy all its creditors, and there is no need to establish elements of a balance between assets and liabilities. The procedure is for getting protection over what is left, and the benefit of controlled management is in view of either the reorganisation of the affairs of the debtor, or, alternatively, the realisation (liquidation) of the assets. It is optional for the debtor to apply for controlled management. There is no obligation for the company's directors to start or undertake such a procedure, and they cannot be held liable for not making an application for the benefit of controlled management.

The management of the company will file an application with the district court's section sitting in commercial matters. The application must be supported by evidence, such as a list of creditors.

The application will be presented to the court in a non-public hearing and if it is not rejected, one of the section judges will be appointed to report on the financial situation of the company. The reporting judge can be assisted by an expert.

As of the appointment of the reporting judge, unsecured creditors may no longer enforce their rights. Pursuant to article 3 of the Decree, even the beneficiaries of pledges and mortgages are, in principle, precluded from enforcing their secured claims. However, with regard to the provisions of the Law of 5 August 2005 on Financial Collateral Arrangements, security falling within the scope of the 2005 Law will be enforceable notwithstanding the controlled management procedure.

Furthermore, as of the same judgment, the company may not, without the written approval of the reporting judge, dispose of its assets, grant pledges or mortgages, make commitments or receive moveable property.

Once the report has been finalised, the court decides whether the application for controlled management will be granted or rejected. If the application is granted, one or more administrators will be appointed by the court.

Pursuant to article 5 of the Decree, the administrators shall make an inventory of the assets of the company as well as an assessment of the financial situation. Furthermore, they shall prepare a reorganisation or a liquidation plan according to article 6 of the Decree.

The company may not, without the administrators' prior approval, and under penalty of nullity of such acts, dispose of its assets, grant pledges or mortgages, make commitments or payments, enter into settlement agreements, borrow money or receive funds. The administrators may impose measures to preserve either the company's interests or those of the creditors.

The administrators may also challenge (voidance actions or clawback actions) transactions and payments made in violation of the creditor's rights and in violation of the Decree. In addition, with the court's approval, they can plan liability actions against the directors, managers and auditors of the debtor.

Once the reorganisation or liquidation plan has been prepared, it will be forwarded to creditors, co-debtors and guarantors known to the administrator and the court, and published. The plan must take into account the interests of all the parties, namely the debtor and the creditors, and it must respect the ranking of the privileges and mortgages. Contractual forfeit, annulment and penalty clauses are inoperative with regard to the reorganisation or liquidation plan.

In the two weeks following the communication and publication of the plan, the creditors will have to inform the court whether they

accept or reject the plan. The court may only accept the plan if more than 50 per cent of the creditors (in number) representing more than 50 per cent of the claims (in value) have approved the plan. Creditors who have not taken part in the vote are deemed to have accepted the plan.

If the court nevertheless rejects the plan, it will either reject the application for the controlled management or ask the administrators to amend the initial plan. After the plan has been amended, it will once again be forwarded to the creditors, co-debtors and guarantors and published in the Luxembourg Gazette (Mémorial).

If the court decides to approve the plan, it will render a judgment that will be binding on the company, all of its creditors, the co-debtors and guarantors (even if the latter have paid the debts after the judgment). The judgment will be published in the Mémorial and in a newspaper determined by the court.

10 Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

Reorganisation procedures are only available to the debtors themselves; creditors cannot apply for a reorganisation procedure to be opened against their debtor. The only available proceedings open to them are bankruptcy proceedings, an intervention for appeal in a controlled management procedure or filing a complaint with the public prosecutor in respect of a company that pursues activities contrary to criminal law or that seriously contravenes the provisions of the LCC or the laws governing commercial companies, including those governing business licences. In the latter case, the district court may, at the request of the public prosecutor, order the dissolution and liquidation of said company.

11 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result?

Under article 440 of the LCC, there is a statutory duty for a debtor (which means in practice, the company's directors, in the case of a company) to file a declaration of bankruptcy with the commercial court within 30 days from the date of cessation of payments. Cessation of payments means that the debtor owes monies to third parties or creditors, that these monies are due (contractually or legally due), and that it has not the funds nor the cash available to pay them. To be in a bankrupt situation from a legal point of view, the second test for bankruptcy must also be met. The second test is loss of credit-worthiness, which means that the debtor can no longer obtain credit from its banks, creditors, shareholders or parent companies. If both tests are met (cessation of payments and loss of credit-worthiness), the debtor will be in a bankrupt situation, and the directors are obliged to file a declaration of bankruptcy with the Luxembourg commercial court. This is no longer an option, it is an obligation. If the directors do not comply with that specific provision, then they may be held liable for irregular bankruptcy under article 573 of the LCC (criminal offence).

In this context, it is worthwhile mentioning that the assessment of 'bankruptcy' in a criminal law matter is independent from the legal criteria for bankruptcy in the meaning of the bankruptcy law as laid down by the LCC. As a consequence, a judge sitting in criminal matters may find that the factual conditions for 'bankruptcy' were given despite the fact that no commercial bankruptcy had ever been declared.

12 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use of assets and to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

In controlled management proceedings, the debtor generally continues operating its business. However, it cannot, without the administrators' prior approval and under penalty of nullity of the transaction, dispose of its assets, grant pledges or mortgages, make commitments or payments, enter into settlement agreements, borrow money or receive funds. The administrators may impose measures to preserve either the company's interests or those of the creditors.

The creditors who supply goods or services during the period of controlled management will have a privileged ranking for all goods supplied and services rendered during the reorganisation process, and, if the reorganisation turns over into a bankruptcy, these creditors maintain a privileged ranking for their claims, and they will be paid prior to all other ordinary unsecured creditors. During the reorganisation process, the creditors have no specific role in terms of supervising the debtors' business activities. The creditors will, however, play an important role once the court appointed administrators present their reorganisation or liquidation plan, because either plan will need the creditors' approval (see question 9).

13 Rejection and disclaimer of contracts in reorganisations

Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

Unless the contract provides to the contrary, the debtor undergoing a reorganisation cannot reject or disclaim an unfavourable contract. The contract may only be terminated in accordance with the contractual stipulations or applicable law, otherwise the terminating party might be held liable for damages.

However, contractual default clauses, rescission and penalty clauses are inoperative with regard to the reorganisation or liquidation plan (see question 9).

14 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

In controlled management proceedings, the debtor may not, without the administrators' prior approval and under penalty of nullity of the transaction, dispose of its assets. The administrators may impose measures to preserve either the company's interests or those of the creditors.

The administrators may also challenge or initiate an action to set aside a transaction or payment that has been made in fraud of the creditor's rights and in violation of the Decree. In addition, with the court's approval, they can initiate liability actions against the directors, managers and auditors of the company and initiate nullity actions in certain circumstances.

In bankruptcy proceedings, the court-appointed receiver can immediately sell perishable moveable assets with the juge-commissaire's approval. All other assets, whether moveable or immovable, can only be sold with the court's authorisation following a report of the juge-commissaire and the bankrupt company or merchant's comments (article 477 of the LCC).

As a matter of principle, the purchaser will acquire the assets free and clear of any claims, and free and clear of any pledge or mortgage. However, pursuant to article 285 and following the Law

on Commercial Companies, a transfer of assets, a transfer of a branch of activity or a transfer of assets and liabilities can also occur in the form of a division during bankruptcy proceedings or proceedings relating to composition with creditors or controlled management, in which case it is conceivable to not simply sell assets, but to transfer a business totally, or in part, with all assets and liabilities attached.

15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

In bankruptcy proceedings, unsecured creditors and creditors with a general priority right are, as of the bankruptcy adjudication, no longer permitted to take any action based on title to moveables and immoveables, nor any enforcement action against the bankrupt company's moveable or immovable assets. Actions may only be exercised against the receiver (articles 452 and 453 LCC), in principle, by way of filing of proofs of debt.

In addition, as of the date of the bankruptcy adjudication, no interest on any unsecured claim will accrue regarding the bankruptcy estate.

Secured creditors who are holding, for example, a validly instituted pledge may enforce the security over the pledged assets regardless of the bankruptcy adjudication. The same applies for the creditors holding a first-ranking mortgage. Furthermore, interest on debts that are secured by collaterals such as a pledge or a mortgage will continue accruing until the day such collateral is enforced (article 451 LCC).

In controlled management proceedings, unsecured creditors may, as of the appointment of the reporting judge, no longer enforce their rights. Pursuant to article 3 of the Decree, even the beneficiaries of pledges and mortgages are, in principle, precluded from enforcing their secured claims. However, with regard to the provisions of the Law of 5 August 2005 on Financial Collateral Arrangements, security falling within the scope of the 2005 Law will be enforceable notwithstanding the controlled management procedure.

16 Arbitration processes in bankruptcy

How frequently is arbitration used in insolvency proceedings? What limitations are there on the availability of arbitration in insolvency cases? Will the court allow arbitration proceedings to continue after an insolvency case is opened?

An arbitral award cannot open bankruptcy proceedings against a company that has its effective registered office or its centre of main interests in Luxembourg or individuals who have their domicile within the district of one of the two Luxembourg district courts. Indeed, except for the instances provided by European Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, Luxembourg district courts, sitting in commercial matters (Luxembourg City or Diekirch) have exclusive jurisdiction to open bankruptcy proceedings against said entities or persons.

However, it is conceivable that an arbitration procedure can be used by shareholders to obtain the compulsory liquidation of a company pursuant to article 1871 of the Civil Code, in the case of a dispute among the shareholders, if they are, for example, bound in their shareholders' relationship by an arbitration clause.

Other insolvency procedures, such as composition with creditors and controlled management, are not available through arbitration proceedings, because of the exclusive jurisdiction given by the law to the judicial authorities with that regard.

As regards arbitration proceedings to be used after (not for the opening of) the bankruptcy or another insolvency procedure, a distinction must be made between actions that directly result out of and relate to the bankruptcy proceedings, for which the district court that opened the proceedings will keep exclusive jurisdiction, and for

which arbitration clauses will not operate, on the one hand, and ordinary contractual or legal court actions for which arbitration clauses remain valid. For this second category, the bankruptcy receiver, in a bankruptcy, or the administrator, in controlled management, will need to stick with the arbitration clause and submit itself to arbitration, as the case may be.

17 Set-off and netting

To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Pursuant to the law, there are three types of set-off: legal set-off, contractual set-off or judicial set-off. Legal set-off occurs automatically, even without any specific act from the debtor, if two parties have claims against each other that are identical in object, liquid and due, unless it has expressly been agreed that legal set-off or legal compensation should not occur. Contractual set-off is the result of an agreement concluded among two parties that agree from time to time to the netting of their respective claims or positions, which must not necessarily have an identical object. Judicial set-off is a set-off that is ordered by a court in the frame of legal proceedings between two parties, holding claims one against the other.

Pursuant to articles 444 and 445 of the LCC, and all relevant case law rendered thereunder, a set-off, whether legal, contractual or judicial, is prohibited in a bankruptcy, because of the principle of equal treatment of creditors. However, it has always been admitted that a legal set-off remains possible in bankruptcy proceedings as well as in controlled management proceedings if the claims held by one party against the other have been liquid and due before the opening of the relevant insolvency procedure, or if the relevant payment obligations have a connection. It is even conceivable that legal compensation remains possible after the opening of the insolvency procedure in the case of connection of two payment obligations finding their source and origin in the same contract, even though one of the obligations becomes due only after the opening of the insolvency proceedings. As a matter of principle however, contractual set-off or judicial set-off are no longer conceivable after the opening of insolvency proceedings.

Since the implementation of the European Directive on Financial Collateral Arrangements by the Law dated 5 August 2005 on Financial Collateral Arrangements, the netting of claims or positions in financial instruments effected in the case of reorganisation measures, winding-up proceedings or similar proceedings is valid and enforceable against third parties, receivers and liquidators or other office holders, whatever the date of maturity, the subject matter of the currency or the claims or positions in financial instruments may be, provided that the netting arises from contracts that are the subject of bilateral or multilateral netting agreements or provisions concluded between two or more parties. The netting is also valid and enforceable if it is effected through the intervention of public organisations or financial sector professionals in charge of clearing and settlement of payments or financial instruments. The netting may be effected, except if agreed otherwise, without prior notice.

Furthermore, pursuant to the same law, provisions providing for connection of claims or positions in financial instruments, as well as termination provisions, indivisibility provisions, margin provisions, substitution provisions, close-out netting provisions, the terms and conditions of valuation and netting and any other provisions stipulated to enable netting as contemplated under the proceedings, are also valid and enforceable against third parties, receivers and liquidators or other similar office holders. They are effective:

- notwithstanding the commencement or continuation of reorganisation procedures or winding-up proceedings, without regard to the moment when these provisions, including those providing for netting, have been agreed upon or enforced; and
- notwithstanding any attachment, whether civil, penal or judicial,

or penal confiscation or other disposition of or in respect of such claims or positions in financial instruments.

18 Intellectual property assets in insolvencies

May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Except for certain legal exceptions (eg, employment agreements) and provided that the relevant agreement does not include an automatic termination clause due to the opening of insolvency or liquidation proceedings, agreements are generally not affected by a bankruptcy adjudication, controlled management proceedings or liquidation process.

The court-appointed receiver can thus continue using IP rights granted under an agreement. Being bound by stipulations of the agreement, the receiver can only terminate the agreement and use the IP in accordance with the relevant contractual provisions.

19 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Bankruptcy law does not expressly provide a prohibition against the court-appointed receiver obtaining secured or unsecured loans or credit. However, since the aim of the bankruptcy receiver is to realise the assets of the bankrupt company to pay off its debts, rather than to continue the business, and since the receiver may not worsen the situation of the bankruptcy estate, it is unlikely that the receiver would be authorised by the court or juge-commissaire to apply for loans or facilities.

The same applies to an involuntary liquidation.

In controlled management proceedings, the grand-ducal decree of 24 May 1935 provides that a company may not, without the administrators' prior approval and under penalty of nullity of the transaction, borrow money, receive funds or grant pledges or mortgages. Secured or unsecured loans or credit are thus conceivable if they are in the company's interests and approved by the administrator. The loans or facilities would have to be included in the reorganisation plan.

If the debtor in liquidation or under reorganisation nevertheless borrows money for the continuation of its activity or optimisation of the realisation of his assets, the relevant loan given by one or more creditors would have priority in ranking over all other ordinary unsecured creditors. As a matter of principle, it is not prohibited for a bankruptcy receiver, liquidator or administrator to give security to a lender for the loan obtained during the relevant insolvency or reorganisation proceedings.

20 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

In controlled management proceedings, the reorganisation plan must take into account the interests of all the interested parties (ie, the company and the creditors) and it must respect the ranking of the privileges and mortgages. Contractual forfeit, annulment and penalty clauses are inoperative with regard to the reorganisation or liquidation plan. Once the reorganisation plan has been prepared, it will be forwarded to creditors, co-debtors and guarantors known to the administrator or court and it will be published in the *Mémorial*.

In the two weeks following the communication and publication of the plan, the creditors will have to inform the court whether they accept or reject the plan. The court may only accept the plan if more

than 50 per cent of the creditors (in number) representing more than 50 per cent of the claims (in value) that have not been disputed by the administrators have approved the plan. Creditors who have not taken part in the vote are deemed to have accepted the plan.

The grand-ducal decree of 24 May 1935 on Controlled Management Proceedings does not provide a provision with respect to a release from liability in the reorganisation plan of non-debtor parties.

It is conceivable that a reorganisation plan or a liquidation plan comprises a release to be given by the debtor to officers, directors, and third-party advisers, and such a waiver should be binding on all the creditors if the reorganisation or liquidation plan is approved, but only in as far as the rights belonging to the debtor (itself) against those officers, directors and third-party advisers are concerned.

Such a release would not be effective, however, with respect to the liability in tort as provided by articles 1382 and 1383 of the Civil Code for the benefit of shareholders or creditors, as far as personal damage is concerned, and with respect to criminal liability.

21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

The law does not provide for specific provisions in relation to expedited reorganisations.

22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What if the debtor fails to perform a plan?

In controlled management proceedings, if the reorganisation or liquidation plan is rejected by the court or the creditors, the court may consider that the conditions for the opening of insolvency proceedings are fulfilled and, as a consequence, declare the company bankrupt. The court will then determine a 'suspect period' that generally dates back no more than six months from the date on which the initial application for the controlled management procedure was filed with the court.

In addition, if the debtor fails to perform a reorganisation or liquidation plan that has been approved, bankruptcy proceedings may be instigated by the creditors.

23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees can be formed and what powers or responsibilities do they have? May creditors pursue the estate's remedies against third parties?

Creditors are informed of the bankruptcy adjudication by way of a publication of excerpts of the bankruptcy judgment that are made in two local newspapers within three days following the bankruptcy adjudication (article 472 LCC).

Furthermore, pursuant to article 40 of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, as soon as insolvency proceedings are opened in a member state, the court of that state having jurisdiction or the receiver appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in other member states. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.

The creditors must lodge their claims, together with the supporting documents, within the period indicated in the bankruptcy judgment (generally within 15 to 20 days of the judgment) (article 496

LCC). In practice, the creditors are authorised to lodge their claims until the claims verification process is closed.

The claims lodged must indicate the nature of the claim, the date on which it arose and its amount, as well as whether the claimant alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee it is invoking (article 498 LCC).

If the receiver disputes a claim that has been lodged by a creditor, he must convene the creditor for a court hearing to discuss the disputed claim in the frame of the verification procedure.

Pursuant to a law dated 30 June 1930 organising the creation of creditors' committees, in bankruptcy proceedings the supervising judge shall within 15 days designate a committee of creditors comprising at least three of the most important ordinary unsecured creditors. However, the district court sitting in commercial matters, having opened the bankruptcy proceedings, can decide that no creditors' committee shall be put in place if it appears that the bankruptcy will be dealt with in a short time, but such decision can be revoked at any time. If a creditors' committee is put in place, the mission of such committee shall consist of assisting the bankruptcy receiver and supervising the operations of the bankruptcy. The creditors' committee has an advisory function only, and does not have any power to take decisions. Creditors' committee meetings shall take place every three months, and they shall be convened by the supervisory judge of the bankruptcy.

As regards the right to initiate individual court actions, as a matter of case law, it is admitted that individual creditors shall not be allowed and shall not be admissible to initiate individual court actions against officers, directors or third parties for the losses they have suffered in their dealings with the debtor because of the bankruptcy or the insolvency procedure, unless they have suffered a personal and separate loss different from the loss suffered by the general body of all the creditors of the bankruptcy, in which case individual court actions initiated by creditors are conceivable.

24 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Under the law there are no joint insolvency proceedings over the assets and liabilities of affiliated companies. If a company within a group of companies becomes insolvent, there is no difference in the insolvency proceedings compared to those conducted in respect of a company that is not part of a group of companies. There is no *per se* extension of the insolvency of one affiliated company to another affiliated company in a group of companies and no overall insolvency proceedings for the whole group of companies.

An exception to the principle of separate treatment might be conceivable if the assets and liabilities of an affiliated company are intermingled with the assets and liabilities of the bankrupt company. According to legal doctrine, an intermingling of assets and liabilities might result from an interweaving of the assets and debts of various companies making it difficult to determine each party's rights.

In exceptional bankruptcies or in important liquidations, the Luxembourg District Court, sitting in commercial matters, has agreed to take into account the insolvency of a corporate group as a whole, and based on applications made by the relevant liquidators, pooling arrangements have been put in place to pool the assets of and the recoveries made by several separate legal entities, for the purpose of distributing identical dividends to pool creditors of all of these legal entities. Such a pooling arrangement has been put in place and approved by the Luxembourg District Court in the very famous BCCI liquidation (Bank of Credit and Commerce International) between Luxembourg, UK and Cayman entities.

25 Modifying creditors' rights

May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The court is bound by the legal provisions regarding the creditors' ranking and thus cannot change the rank of a creditor's claim, unless the privilege or ranking given by a specific creditor, for example during the suspect period, is voidable pursuant to article 445 or 446 of the LCC, which allows the bankruptcy receiver (in a bankruptcy) or the administrators (in controlled management) to initiate avoidance actions against certain detrimental acts.

The law does not contain provisions that would downgrade certain claims, in terms of ranking, in the event of bankruptcy proceedings or a controlled management procedure.

26 Enforcement of estate's rights

If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

As of the date of the bankruptcy adjudication, the receiver represents the creditors collectively. As such, the receiver is the only person who may initiate legal proceedings on behalf of the estate. In practice, the receiver requests the court's or judge-commissaire's approval prior to initiating legal actions. The costs of such proceedings are super-privileged and will thus be paid prior to other debts.

In theory, it is conceivable for the creditors to pursue the remedies or rights that belong to the bankrupt estate if the bankruptcy receiver is negligent, or does not have the funding to initiate the relevant court actions. Pursuant to article 1166 of the LCC, creditors may indeed exercise the rights and actions that belong to their debtor, except for the rights that are exclusively attached to the person of the debtor, if the debtor does not exercise its rights itself for the benefit of its creditors. This possibility can also apply in bankruptcy proceedings. As a matter of doctrine and case law, the result of the action initiated by the creditors on behalf of a debtor who is negligent or otherwise not able to pursue will nevertheless belong to the debtor (ie, in bankruptcy or controlled management proceedings, the result of the action or the fruits of such actions fall to the estate for further distribution to the benefit of all the creditors, as opposed to only the creditors that initiated the action).

27 Claims and appeals

How is a creditor's claim submitted and what are the time limits?

How are claims disallowed and how does a creditor appeal? Are there provisions that deal with the transfer of claims against the debtor?

The bankruptcy judgment indicates a period within which the creditors must lodge their claims. If the receiver disputes a claim that has been lodged by a creditor, he must convene the creditor by way of a registered letter for a court hearing (the date of the first hearing is indicated in the bankruptcy judgment) to discuss the disputed claim.

As a consequence of the verification process, the bankruptcy court will render a judgment that can be appealed by either party. The appeal will be dealt with by the court of appeal. If the court of appeal confirms the rejection ordered by the court of first instance, the creditor will no longer be seen as a creditor of the estate.

There are no particular provisions in the LCC regarding the assignment of a claim against a debtor. However, according to articles 1689 *et seq* of the Civil Code, claims or outstanding debts, rights and actions against third parties may be assigned by the creditor or owner of such rights. Consequently, a creditor who has a claim or right to compensation may assign such claim or right to an assignee. Article 1690 of the Civil Code requires a notification of the assignment to the debtor, either by a notary public deed or in a deed under private seal.

28 Priority claims

What are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Pursuant to article 561 of the LCC, the costs and the disbursements made for the administration of the bankruptcy (which include the fees of the bankruptcy receiver, all bankruptcy administration costs, all disbursements made in the interest of the liquidation of the bankruptcy, etc) will be paid first. The fees, costs and disbursements relating to the administration of the bankruptcy are super-privileged in terms of payment.

The same article of the LCC retains the principle that privileged creditors are paid next, and that amounts available after the full payment of all privileged creditors will be distributed on a pro rata basis to ordinary, unsecured creditors.

As regards the privileged creditors, the major privileged and priority claims that should be mentioned are:

- legal costs;
- funeral costs;
- super-privileged claims of employees (wages of the past six months with a ceiling of six times the legal minimum wage); and
- tax and social security claims.

These general privileges on moveable and immoveable property are mentioned under articles 2101 and 2104 of the Civil Code. Specific privileges on immoveable assets, pursuant to article 2102 of the Civil Code, are:

- rent payments due are secured by the furniture located in the relevant building;
- the claim of a pledge holder over the assets pledged for his benefit;
- the costs to be paid for the conservation of moveable assets; and
- the price for moveable assets which remain unpaid.

The most important specific privileges on immoveable assets are mortgages and privilege over immoveable assets.

The question of which priority and privileged claims have priority over secured creditors is quite complex. In substance, it is considered by case law and doctrine that certain creditors are considered as being *hors de la masse*, which means that they are not subject to ordinary distribution and priority rules. This is the case for the first ranking pledgee. Its payment will depend on the result of the sale of the assets pledged to its benefit, respectively the valuation made in the case of appropriation of the pledged assets. The same rule applies for the first-ranking mortgage holder.

29 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

In bankruptcy proceedings, the aim is to realise the debtor's assets to pay its privileged debts in full, and the unsecured debts on a pro rata basis, as far as assets or monies are available. As such, no liabilities survive after the closing of the bankruptcy.

For the controlled management procedure, the approach is very similar. The purpose of the reorganisation or liquidation plan is to deal with all outstanding debts, and the reorganisation or liquidation plan, once approved, will be binding, without limitation, on all creditors. Theoretically, no debt or liability will survive.

This is, however, different in a procedure for composition with creditors. Pursuant to article 25 of the Law dated 14 April 1886 on the *concordat préventif de la faillite*, a debtor who has entered into a composition with its creditors will be required to pay all of its liabilities if its financial situation improves after the approval of the composition with its creditors.

30 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

Under the bankruptcy procedure, article 508, 561, 562 and 563 of the LCC contain the relevant provisions for distributions and interim distributions to creditors. As a matter of principle, interim distributions are made to ordinary unsecured creditors only as far as monies are available after payment, in full, of all creditors with higher priority ranking or creditors with a privilege. If distributions or interim distributions are made before all creditors' claims have been verified, the bankruptcy receiver needs to make provisions or set funds aside to cover the amounts theoretically due to creditors that have not yet been admitted. At the end of the liquidation or the bankruptcy, monies that cannot be paid to creditors (because of loss of contact, lack of payment instructions, etc) will be paid into the public treasury.

Under a controlled management procedure, distributions must be made in conformity with the reorganisation or liquidation plan as approved by the creditors and the Commercial Court. As a matter of principle, privileged creditors must be paid in full (they do not necessarily participate in the plan and do not vote on the plan), and ordinary unsecured creditors will be treated equally under the reorganisation or liquidation plan. Recent case law has admitted however that notwithstanding the principle of equal treatment of creditors having the same ranking, a reorganisation or liquidation plan can foresee different treatment of different categories of unsecured creditors.

31 Transactions that may be annulled

What transactions can be annulled or set aside in bankruptcies and what are the grounds? What is the result of a transaction being annulled?

All payments made after the bankruptcy adjudication are void (article 444 LCC). The following transactions or payments are null and void if they have been made during the suspect period or in the 10 days preceding it (article 445 LCC):

- donations by the company of moveable and immoveable property;
- transactions where the company received consideration but where the consideration is below the effective, fair value of the asset;
- payments whether in cash or by way of a set-off for non-matured debts;
- for matured debts, payments that have not been in cash or by way of negotiable and non-negotiable papers; and
- mortgages and pledges granted during the suspect period for existing debts (it being noted that collateral granted pursuant to the 5 August 2005 Law is validated).

In addition, based on article 446 LCC, the bankruptcy receiver may challenge and initiate nullity actions in the following events:

- payments of debts that have not fallen due and transactions realised during the period of the cessation of payments, if the contracting party has knowledge of the cessation of payments; and
- mortgages and privileges that have been granted either 10 days prior to or after the date of the cessation of payments if more than 15 days have elapsed between the granting of the mortgage or privilege and its registration.

Finally, pursuant to article 448 of the LCC, all transactions and payments that have been made in fraud of the creditors' rights are null and voidable, whenever they were made.

In the event of an annulment of a transaction or payment, the assets or monies will be returned to the bankruptcy estate.

32 Proceedings to annul transactions

Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

If a company or a merchant is declared bankrupt, the court determines the suspect period, which generally dates back no more than six months from the date on which the court formally adjudicates the company bankrupt.

Pursuant to articles 445, 446 and 448 of the LCC, certain transactions or payments made during the suspect period (or even before in the case of article 448) are null and void per se, whereas others may be challenged by the bankruptcy receiver (see question 31). Creditors cannot initiate these nullity actions.

These rules also apply under controlled management. After the appointment of a reporting judge, the company may not, without the written approval of the reporting judge, dispose of its assets, grant pledges or mortgages, make commitments or receive moveable property. If the company does not comply with this procedure, the transaction is void.

33 Directors and officers

Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Corporate law

As a matter of principle, directors or corporate officers of companies are not liable for the debts or obligations of a company, with the exception of unlimited companies, where members are jointly and severally liable, without limitation, for the obligations of the company. Similarly, for limited corporate partnerships and corporate partnerships limited by shares, the unlimited members or unlimited partners will be jointly and severally liable for all the obligations of the company.

According to article 59 section 1 of the Law on Commercial Companies, the directors of a limited company may be held liable towards the company in respect of management errors (ie, for wrongful acts committed during the execution of their tasks).

Article 59 section 2 further states that directors may be held jointly and severally liable to the company and to third parties for all damage resulting from a violation of the Law on Commercial Companies or of the articles of incorporation of the company.

In addition, according to the common rules of tort liability as provided by articles 1382 and 1383 of the Civil Code, a director executing a contractual obligation of the company can be held personally liable on a tort basis by a third party if he violates the duty of due care and diligence and if his fault causes a damage other than the damage caused by the poor execution of the mandate.

These provisions also apply to other commercial companies.

Bankruptcy law

As a matter of principle, directors or corporate officers are not liable for the debts of the bankruptcy estate.

However, pursuant to article 495(1) of the LCC, the court can decide, at the request of the bankruptcy receiver, and if there are not sufficient funds to pay all the debts, to hold the directors liable for all or part of the shortfall in assets, but only if serious misconduct contributed to the bankruptcy situation.

Also, pursuant to article 495 of the LCC, a director of a company may be personally declared bankrupt if he has used the company to hide or cover a commercial activity made in his personal interest, or if he has disposed of the corporate assets as his own assets, or if he has, in an abusive manner and in his personal interest, continued a loss-making activity that was to end up in a cessation of payments.

With respect to bankruptcy proceedings, articles 573 of the LCC and 489 of the Criminal Code provide for criminal sanctions, such as

personal bankruptcy, against directors of bankrupt companies who have failed to declare the bankruptcy within the 30 days of the cessation of payments of the company.

Other cases of irregular bankruptcy under articles 573, 574 and 575 of the LCC are, for example, if there are excessive private expenses; if the directors have, with the intention to delay bankruptcy, made borrowings, circular payments or other damaging operations to obtain new funds; if the directors have, after the cessation of payments, given preferred treatment to one or more creditors to the disadvantage of the general body of the other creditors; if there was no proper accounting; or if assets have been dissimulated or removed.

Article 577 of the LCC deals with a certain number of fraudulent bankruptcy provisions, for example, if part of the assets of the company have been dissimulated or fraudulently taken away, or if there has been false accounting.

In the event of irregular bankruptcy or fraudulent bankruptcy, a certain number of criminal law provisions can apply to the directors or corporate officers, depending on their participation in the relevant wrongdoing.

34 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Under the law, seizures (ie, attachment proceedings) are not possible without an intervention of the courts (be it for the ex parte granting of the authorisation to proceed with the attachment proceedings or, at a later stage, the validation of the attachment).

The only possible way to 'seize' assets of a company without a court intervention or approval would be their appropriation through the enforcement of a contractually agreed pledge.

35 Corporate procedures

Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

According to articles 141 et seq of the Law on Commercial Companies, a company may be dissolved by a resolution of the general meeting of the shareholders in the manner required for the amendment of the articles of incorporation (ie, a representation of a certain part of the share capital, and the winding-up resolution, to be adopted, must be carried by a qualified majority of the votes expressed). The same shareholders' meeting will appoint one or more liquidators. As from this first extraordinary shareholders' meeting, the company is deemed to exist solely for its liquidation purposes.

The liquidators' mission is to prepare a detailed inventory of the company's assets and liabilities, to realise its assets, to pay its debts and to distribute the remaining balance, if any, to the shareholders. The liquidators will, without prejudice to the rights of privileged and secured creditors, pay all the debts of the company, proportionally and without difference between debts that have fallen due and debts that have not fallen due, under deduction of a discount for debts that have not yet fallen due.

In a second extraordinary shareholders' meeting, the liquidators will submit a formal report on their activities to the shareholders, including the use they have made of the corporate assets and the supporting accounts and documents. After submission of the report, the shareholders will appoint one or more liquidation auditors who will verify the liquidators' work.

In a third and final extraordinary shareholders' meeting, the liquidation auditors will present their report describing the activities of the liquidators and commenting thereon. Discharge is granted to the liquidators and resolutions are passed to close the liquidation, to decide upon the lieu where the company's documents are held for the next five years and to decide upon the transfer of the assets that have not been distributed to the creditors or the shareholders.

The termination of the liquidation must be filed with the Luxembourg Register of Trade and Companies and published in the *Mémorial*.

Contrary to bankruptcy proceedings, the above procedure for the dissolution and liquidation of a company is a voluntary process that has been resolved on by the shareholders, and takes place without the intervention of the court or a supervisory judge.

36 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In voluntary liquidations, the third and final extraordinary shareholders' meeting will hear the report from the liquidation auditors, give discharge to the liquidators and pass a resolution to close the liquidation, decide upon the location where the company's documents are to be held for the next five years and decide upon the transfer of the assets that have not been distributed to the creditors or the shareholders. The termination of the liquidation must be filed with the Register of Trade and Companies and published in the *Mémorial*.

In controlled management proceedings, if the court accepts the reorganisation plan, it will render a judgment that will be binding on the company, its creditors, the co-debtors and guarantors (even if the latter have paid the debts after the judgment). The judgment will be published in the *Mémorial* and in a newspaper determined by the court.

In bankruptcy proceedings, the bankruptcy receiver will file an application to the Commercial Court for the passing of accounts and the closure of the bankruptcy procedure, which will be heard once all the available assets and monies have been distributed to the creditors, and that evidence has been produced with that regard. The court will declare the bankruptcy closed by a court order, which needs to be published.

37 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Pursuant to the provisions of EC Regulation No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, any judgment opening insolvency proceedings handed down by a court of another member state that has jurisdiction pursuant to the Regulation will automatically be recognised in Luxembourg from the time that it becomes effective in the state of the opening of proceedings. It shall, with no further formalities, produce the same effects as under the law of the state of the opening of proceedings, unless the above Regulation provides otherwise and as long as no secondary proceedings are opened.

As regards insolvency or bankruptcy judgments coming from a country that is not a member state of the EU, Luxembourg courts, which apply the principle of unity and universality of bankruptcy, take the view that foreign insolvency proceedings shall get full recognition, without any condition of reciprocity, under the conditions that the foreign bankruptcy court order has been rendered in a 'regular' manner and produces itself in its home jurisdiction an extraterritorial effect.

In national insolvency proceedings, foreign creditors are treated the same way as national creditors, except that they may be obliged to elect domicile within the country when filing their proof of debt. Regarding foreign creditors who have their habitual residence, domicile or registered office in a member state of the EU, EC Regulation No. 1346/2000 of 29 May 2000 on Insolvency Proceedings expressly confirms their right to lodge a claim and the receiver's duty to immediately inform known foreign creditors (including information regarding time limits, penalties in relation to those limits, the body or authority empowered to accept the lodgement of claims, etc).

Luxembourg is not a signatory to an international multiparty treaty on international insolvencies, but as a member state of the EU, it is subject to EC Regulation No. 1346/2000. The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Luxembourg.

38 Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries? countries in cross-border cases? If so, with which other countries?

There are no official or publicly available cross-border insolvency protocols or other arrangements regarding the coordination of Luxembourg courts with courts in other countries. The same applies to joint hearings.

In certain cross-border insolvency cases, however, cooperation has taken place among court-appointed liquidators or bankruptcy receivers in Luxembourg and their counterparts in other jurisdictions, by way of entering into cross-border insolvency protocols or similar cooperation agreements (eg, in the *Lehman Brothers* case).

As indicated above, in at least one major cross-border insolvency case, the Luxembourg court-appointed liquidators have entered into pooling arrangements with the liquidators appointed in other jurisdictions (as in the *BCCI* case).

All these cross-border arrangements have necessarily been approved either by the Luxembourg District Court, sitting in commercial matters, or by the supervisory judge of the bankruptcy or liquidation.

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These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the relevant chapter.

Luxembourg	Applicable bankruptcy law, reorganisations: liquidations	Luxembourg continued	Major kinds of voidable transactions
	Non-regulated companies:		<ul style="list-style-type: none"> • Donations of moveable and immoveable property • Transactions where the received consideration is below the effective fair value of the asset • Payments in cash or by way of a set-off for non-matured debts • For matured debts, payments not in cash or by way of negotiable and non-negotiable papers • Mortgages and pledges granted during the cessation of payments period for antecedent debts (security granted under the Law of 5 August 2005 on Financial Collateral Arrangements is excluded) • Payments of debts that have not fallen due and transactions realised during the cessation of payments, if the contracting party has knowledge of the cessation of payments • Mortgages and privileges that have been granted either 10 days prior to or after the date of the cessation of payments if more than 15 days have elapsed between the granting of the mortgage/privilege and its registration • Generally, all transactions and payments made in fraud of the creditor's rights
	<ul style="list-style-type: none"> • Bankruptcy (articles 437 to 592 of the Luxembourg Commercial Code) • Controlled management (grand-ducal decree of 24 May) • Suspension of payments (article 593 et seq of the Luxembourg Commercial Code) • Composition with creditors (Law of 14 April 1886) • Voluntary and compulsory liquidation: Law of 10 August 1915 on Commercial Companies, as amended 		
	Customary kinds of security devices on immoveables		Operating and financing during reorganisations
	<ul style="list-style-type: none"> • Mortgage • <i>Privilège du vendeur</i> • <i>Privilège du prêteur</i> 		The debtor generally continues operating its business. The administrators' prior approval is needed for disposing of assets, granting pledges or mortgages, making commitments or payments, entering into settlement agreements, borrowing money or receiving funds. The administrators may impose measures to preserve the interests of the company and/or the creditors.
	Customary kinds of security devices on moveables		Requirements for approval of reorganisations
	<ul style="list-style-type: none"> • Pledge • Transfer of title or ownership for security purposes • Retention of title 		Acceptance by the court of the reorganisation plan only if more than 50% of the creditors (in number) representing more than 50% of the claims (in value) have approved the plan. Creditors who have not taken part in the vote are deemed to have accepted the plan.
	Stays of proceedings in reorganisations/liquidations		Liabilities of directors and officers
	Controlled management		Corporate law
	<ul style="list-style-type: none"> • Prohibition for unsecured creditors and beneficiaries of pledges and mortgages (save for security falling within the scope of the Law of 5 August 2005 on Financial Collaterals Arrangements) to enforce their rights as of the appointment of the reporting judge. 		<ul style="list-style-type: none"> • Liability of the directors towards the company in respect of management errors • Joint and several liability of the directors to the company and to third parties for damages resulting from a violation of the Law on Commercial Companies or the articles of incorporation of the company • Liability on a tort basis for a director violating the duty of care and diligence whilst executing a contractual obligation of the company
	Bankruptcy/compulsory liquidation		Bankruptcy law
	<ul style="list-style-type: none"> • Prohibition for unsecured creditors and creditors with a general priority right to take any action based on title to moveables and immoveables. • Prohibition to take enforcement action against the bankrupt company's moveable or immoveable assets. 		<ul style="list-style-type: none"> • Criminal sanctions for failing to declare the bankruptcy or irregular/fraudulent bankruptcy • Liability for shortfalls in assets or serious misconduct contributing to the bankruptcy
	Voluntary liquidation		Pending legislation
<ul style="list-style-type: none"> • Secured and unsecured creditors may enforce their claims. 	None.		
Duties of the insolvency administrator			
Controlled management			
<ul style="list-style-type: none"> • Inventory of the assets of the company and assessment of the financial situation • Control of the management and preservation of the interests of the company and the creditors • Preparation of the reorganisation or liquidation plan 			
Bankruptcy/compulsory liquidation			
<ul style="list-style-type: none"> • Realisation of the assets to pay off the creditors 			
Set-off and post-filing credit			
Principle of prohibition of legal, contractual or judicial set-off in bankruptcy. However, post-bankruptcy legal set-off is allowed either if the respective claims are liquid and due prior to the bankruptcy adjudication or if the relevant payment obligations have a connection.			
Filing claims and appeals			
Claims must normally be lodged within the delay indicated in the bankruptcy judgment. Disputed claims are discussed in court; the ensuing judgment may be appealed.			
Priority claims			
<ul style="list-style-type: none"> • Super-privilege for costs and disbursements made for the administration of the bankruptcy • Legal costs • Funeral costs • Super-privileged claims of employees (wages of the last six months with a ceiling of six times the legal minimum wage) • Tax and social security claims • Privileges on moveable and immoveable assets <p>First-ranking pledges and first-ranking mortgage holders are not subject to ordinary distribution and priority rules.</p>			

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