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Common struggles faced by international creditors in Luxembourg bankruptcy proceedings

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A large number of international corporate groups conducting their activities all over the world have holding or finance companies in Luxembourg. Naturally, further to the 2007-11 global financial crisis, business law firms witnessed a surge of international debt restructuring and insolvency proceedings involving large groups of companies. By reason of the current Covid-19 pandemic, history has repeated itself and a number of international creditors need to handle situations involving financially distressed debtors. The present note addresses selected aspects of Luxembourg bankruptcy law which international creditors may encounter – and should watch for – when seeking to have their debtors declared bankrupt in Luxembourg or, on the contrary, when trying to assess the bankruptcy risk as they negotiate a distressed investment or a debt restructuring with a group comprised of key entities located in Luxembourg.

Satisfying the "loss of creditworthiness" criteria

In such situations, an international creditor's first struggle relates to determining when the conditions of bankruptcy under Luxembourg law are met. In accordance with Art. 437 of the Luxembourg Commercial Code ("LCC"), a commercial entity is bankrupt when (i) it has ceased its payments (*cessation des paiements*) and (ii) its credit is exhausted (*ébranlement du crédit*).

Whether the first condition is met can be objectively determined as case law has ruled that the failure to pay a single undisputed, certain, liquid and due debt is sufficient for the District Court to declare a company bankrupt. A creditor may satisfy this requirement by obtaining a judgment against its debtor.[1]

The second condition is less clear-cut and more subjective, as a commercial entity is deemed to have lost its creditworthiness if its trade or business partners refuse to continue trading with it. As it concerns the debtor's internal affairs, information on other creditors' unwillingness to trade with the debtor may not easily be available. Yet, when a creditor applies to the District Court to have a debtor declared bankrupt, it must ensure that both conditions of bankruptcy are met on the day that the bankruptcy judgment is rendered.

Case law provides little guidance as to when or how the second condition is met, and courts often tie the loss of creditworthiness to the debtor's cessation of payments since one's failure to pay its debts as they become due would logically not inspire trust to equity, debt or commercial partners.[2] Loss of creditworthiness may thus be both the cause and the consequence of the cessation of payments. In theory, the existence of one single debt may lead to the loss of creditworthiness if it is sufficient to jeopardise the debtor's affairs entirely.

In order to demonstrate that the "loss of creditworthiness" criteria is met, creditors may seek to provide any evidence that the activities of the debtor are frozen by reason of other creditors' unwillingness to wait to collect what is owed to them, suppliers' refusal to deliver (unless paid in cash), financial institutions' refusal to lend funds, or that the debtor proceeds with payments to ordinary creditors to the prejudice of preferred creditors.[3] One supplier's refusal to deliver may constitute evidence of loss of creditworthiness, but on its own will generally not be sufficient as the criteria concerns the general commercial loss of one's credit in the eyes of trade partners.

How many trade partners must have lost their confidence in the debtor for the criteria to be met? As can be expected, Luxembourg case law does not provide any figures or indications, but rather takes all circumstances and evidence submitted into consideration. Doctrinal guidance provides that a commercial entity is deemed to have lost its creditworthiness when there is no longer a sufficiently broad consensus of creditors maintaining their confidence in the debtor, which results in the debtor not being able to pursue its activities. In practice and in particular in a restructuring context, this is clearly the approach taken by the market and most Luxembourg company boards, in particular in cases where a judicial restructuring is brought forward abroad (typically, via a UK Scheme or foreign equivalent or a US Chapter 11 proceeding).

Facing oppositions after having had a debtor declared bankrupt

Even when the conditions of bankruptcy are met and a judgment declaring a commercial entity bankrupt is rendered, the bankrupt company (or other creditors) may seek to oppose it.[4]

The publication of the bankruptcy in the local Luxembourg newspapers starts an eight-day period for the bankrupt company (or a 15-day period for interested parties such as other creditors) to file an opposition, before the same court that rendered the bankruptcy judgment (Art. 473 LCC). The objective of this opposition procedure, or third-party opposition procedure (*tierce opposition*) when initiated by an interested party, is to retract the bankruptcy judgment. Grounds upon which one may rely to submit such opposition include the following:

(i) The bankrupt company does not qualify as a merchant (*commercant*) in accordance with the LCC. Arts. 2 and 3 of the LCC does not define the term "merchant" but rather widely defines a merchant's acts. These generally include most commercial activities, banking and financial operations. It becomes quickly obvious whether one may rely on this ground to seek to have a judgment retracted.

(ii) The Court was not competent to declare the company bankrupt. In the vast majority of cases, the competence of the court will be difficult to dispute, but opportunities arise when a company is incorporated in two jurisdictions, where the Luxembourg company was just an empty shell or without sufficient Luxembourg substance or where its center of main interests ("COMI") was located in another EU jurisdiction. In such a case, the bankrupt entity can be expected to submit evidence that its COMI (or equivalent criteria applicable for third party/non-EU jurisdictions), including commercial, economic and fiscal ties, are located in another jurisdiction, so that the courts of this second jurisdiction should be held competent to handle its bankruptcy rather than the Luxembourg courts. In most of these cases, choosing a jurisdiction to open bankruptcy proceedings is a strategic decision.[5]

(iii) The bankrupt company is not in cessation of payments. With respect to the first condition of bankruptcy, the bankrupt entity may seek to establish that it is not in cessation of payments as the conditions of the debt (that it is certain, liquid and due on the day of the bankruptcy judgment) are not met. Opportunities to oppose on this ground arise in the event of contingent claims, which may come as a surprise to international creditors. In a number of common law jurisdictions, a creditor may provide evidence of all debts and liabilities of the debtor, present, future or contingent, in order to have the debtor declared bankrupt. In Luxembourg, one may oppose a bankruptcy judgment on the ground that debts have not yet matured and are thus not sufficiently certain if they are contingent or future. This may be the case if the debtor acts as guarantor in a contractual arrangement.

(iv) The bankrupt company has not lost its creditworthiness. With respect to the second condition of bankruptcy, the bankrupt entity

may seek to establish that it continues to benefit from payment deferrals, that it is able to renegotiate agreements, that its commercial affairs are not seriously disrupted, and provide evidence of the quality of its commercial organisation and reputation. When facing such oppositions, it is advisable for creditors to pay close attention to the status of the debtor's payments to social security bodies as it may have failed to pay these to artificially maintain its credit and give an appearance of creditworthiness.

Relinquishing control to the trustee

Contrary to what many foreign creditors would expect, creditors play a minor role in the Luxembourg bankruptcy process. Once appointed by the court (without consultation of any third parties, including creditors), the trustee represents the interests of both the bankrupt company and its creditors, and will not seek the creditors' approval or views when taking any decisions. Rather, the trustee acts under the supervision of the supervisory judge (*juge-commissaire*) which is appointed at the same time as the trustee in the bankruptcy judgment. There is also no credit bidding process under Luxembourg law and the trustee does not have to consider bids made by any creditors.

Creditors may reach out to the trustee to draw its attention to the bankrupt company's financial status, any suspicious prior commercial acts or possibly fraudulent transactions, which the trustee may seek to challenge to recover monies for the benefit of creditors as a whole.[6] Trustees also have the power to initiate proceedings against directors of the bankrupt company under Art. 495 LCC,[7] Art. 495-1 LCC[8] and Art. 441-9 of the law of 1915 on commercial companies.[9] While the trustee is under no obligation to respond to creditors' communications, it is likely to take into consideration any objective information and facts. However, in our experience, Luxembourg trustees are unlikely to accept creditors' requests to form a committee of creditors and convene regular meetings to consult them, get their views and answer their questions. This contrasts drastically with the approach taken by common law jurisdictions.

This being said, we note that trustees are often willing to keep the creditors updated of the steps taken during the bankruptcy process. In certain cases, trustees have set up websites to inform creditors of the evolution of the situation of the bankrupt company, of the assets recovered, the steps taken by the trustee (e.g. investigations, proceedings, etc.) and to communicate with the creditors generally. This may provide creditors with guidance on the next procedural steps, the conduct of the process which they may not be familiar with and an opportunity to state their position.[10]

Assisting with securing funding to initiate proceedings on the merits

When a trustee believes that it has grounds to seek the annulment of a transaction, during the hardening period or prior to it, or recover assets from the bankrupt company's directors, it will start legal proceedings by way of a writ filed before the District Court sitting in commercial matters, and make the case for the reimbursements of the amounts.

Taking such steps will require the trustee to have funds already at its disposal within the bankrupt company's estate. In cases where little or no assets are available, the trustee may seek outside funding from third parties if it is in the best interests of the bankrupt company and of its creditors. Typically, trustees have two options:

(i) If the bankrupt company has claims against third parties, the trustee may sell these claims, likely at a discount. The bankrupt company's movable goods (such as claims) may be sold with the authorisation of the tribunal, which, upon the supervisory judge's report, will determine the conditions of the sale.

(ii) Trustees may also approach third-party

funders which business model is to finance the costs of the proceedings (legal costs, expert costs, etc.) in exchange for a percentage of the proceeds. While the practice of third-party funding is not regulated in Luxembourg, nothing prevents it. It has become common practice in neighbouring countries and third-party funders have opened offices and invested in claims in Luxembourg.

Luxembourg directors' duties in an insolvency context

Creditors often try to assess the Luxembourg board of director's strategy when the Luxembourg company is in financial distress and there could be a risk of their filing for bankruptcy. We also see often that, especially US creditors try to pressure boards into following their views on what to do with the companies' assets to satisfy their claims. In this context, the fact that directors have a legal duty under Luxembourg law to file for bankruptcy within one month of the cessation of payment (though this obligation was suspended as part of the Covid-19 emergency measurer) sometimes puts a strain on debtor-creditor discussions.

Under Luxembourg law there is no concept of "fiduciary duty" as such, similar to the one under US law for instance. However, the directors of a Luxembourg company must act with loyalty, honesty and in good faith and for the Luxembourg company's corporate benefit. When a creditor seeks to bring forward a claim against the directors of a Luxembourg company for failure to comply with their duties, the burden of proof is high as the creditor would need to prove (i) a fault/negligence (violation of the articles of association and/or the law or under the general principles of tort);[11] (ii) a prejudice or loss that the creditor sustained as a result (which must be a personal prejudice and not simply a general one);[12] and (iii) the causality between the fault/negligence and the loss or damage incurred. When assessing the interests of the company, directors should primarily consider the company on a standalone basis, and not the interests of the broader corporate group unless these are linked to the individual interest of the Luxembourg company itself.[13]

Luxembourg law also sanctions situations where directors use the company for personal purposes and do not respect the principle of the company as a separate entity, its object and the functioning of its bodies. In this respect, the provisions of Art. 495 LCC allow to extend the bankruptcy of the company to the directors personally when (i) they pursued their own interests while seeming to act on behalf of the company; or (ii) they used the company's goods/assets as their own; or (iii) they abusively pursued, in their personal interests, an operating deficit which could only lead to the company's cessation of payments.[14]

Further, when it appears that the assets of the bankrupt company are not sufficient to satisfy its creditors, the trustee may petition the Court to declare that the directors shall be held liable for the debts of the company, in whole or in part, jointly or severally, if it can be demonstrated that the directors' gross misconduct led to the company's bankruptcy.[15] This action seeks to force the directors to cover the company's liabilities and is not common in Luxembourg since it would be necessary to establish that the directors' wrongdoings (and possibly fraudulent intent) were sufficiently grave to have significantly contributed to the company's bankruptcy. The causal link between the wrongdoing and the bankruptcy is essential for this action to succeed.

No specific duties are imposed on directors if the company encounters financial difficulties, other than to closely and regularly monitor the company's financial situation and take any measures that may be deemed necessary and appropriate, to allow the company to continue its existence and avoid a value-destructive Luxembourg insolvency/liquidation process. In particular, there is no requirement or expectation under Luxembourg law that directors of a distressed or insolvent company would have to hold the assets of the company on trust for the

benefit of its general body of creditors, or any particular creditor. The directors' responsibility in a financial distress scenario remains to continue to act in the best interest of the company.

A trend towards business continuity in the legislative reform

In a context of the ever-increasing number of bankruptcy proceedings in Luxembourg, the general view is that the current legislation is obsolete and no longer appropriate to the needs of creditors and of distressed companies. The long-awaited reform of the insolvency legislation, initiated by the draft bill of law No. 6539 in 2013, continues to be discussed and commented on at several levels within the Luxembourg government.

Keeping in mind that one single creditor with the necessary evidence at its disposal may quickly have a debtor declared bankrupt (if the conditions are met on the day that the judgment is rendered) to the possible detriment of many other creditors, a guiding principle of the reform includes preventive measures. These include economic signals based on information available to public entities (social plans, debts to certain authorities, etc.) to identify – at an early stage – struggling entities to allow them to take preventing steps and reorganise their activities, taking into account their creditors' claims and interests. The information gathered may also assist in assessing the opportunity of an application for bankruptcy, with a view to avoid what seems to have now become a near-automatic recourse to bankruptcy proceedings.

Notes:

[1] A commercial entity seeking to declare voluntary bankruptcy (*aveu de faillite*) must submit its balance sheet with evidence of the extent of its liabilities and subsequent warranty calls from its creditors. It should however be noted that there have been certain instances where the Luxembourg court did not request a court order to evidence that the claim was indeed due.

[2] The reverse is not necessarily true as a company would not be found bankrupt if it maintains strong credit with partners despite having ceased its payments.

[3] Trib. Lux., 10 février 1995, n°44568 ; CA, 4 décembre 2013, n°40250 ; CA, 12 novembre 2014, Pas. Lux., 2015/5, p. 340-345.

[4] In practice, one does not have any opportunity to object before the bankruptcy judgment is rendered.

[5] In the case of a voluntary declaration of bankruptcy, the company can be expected to strategically file for bankruptcy in one jurisdiction and submit documentation to prove the competence of the chosen court. In doing so, it may go as far as to seek the support of the second court.

[6] A trustee may rely on several provisions of the LCC to seek to annul payments and transactions made by a bankrupt company concluded during the "hardening period" (*période suspecte*), usually starting six months and 10 days prior to the bankruptcy judgment, on the basis of Arts. 445 and 446 LCC. Irrespective of the hardening period, a trustee may rely on Art. 448 LCC to challenge any fraudulent payment and transactions made prior to the bankruptcy and which are damaging to the creditors as a whole, without any limitation of time.

[7] These provisions allow the trustee to extend the bankruptcy of the company to the directors personally and seek to sanction situations where directors use the company for personal purposes and do not respect the principle of the company as a separate entity, its object and the functioning of its bodies.

[8] When it appears that the assets of the bankrupt company are not sufficient to satisfy its creditors, the trustee may petition the Court to declare that the directors shall be held liable for the debts of the company, in whole or in part, jointly or severally, if it can be demonstrated that the directors' gross misconduct led to the company's bankruptcy.

[9] Under these provisions, directors are responsible for the execution of their mandate and any misconduct in the management of the company's affairs. The standard applicable is how a good parent would manage its family (*en bon père de famille*).

[10] By way of an example, the trustee of the Espirito Santo insolvencies has set up a website available at: http://www.espiritosantoinsolvencies.lu/default.htm (last consulted on April 7, 2021).

[11] Article 441-9 (2) of the Law of August 10, 1915 on commercial companies

[12] Trib. Lux., June 29, 2007, n° 104787

[13] A. Steichen, «Précis de Droit des sociétés», *La création de groupes de sociétés*, 2018, pp. 438-472.

[14] Directors may be declared personally bankrupt when one of these conditions is met, provided that the usual conditions of bankruptcy are also met (they can be considered as merchants, lost their creditworthiness and are in a situation of cessation of payments).

[15] 495-1 LCC.

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