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Structured Finance in Luxembourg: What About Restructuring?

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Introduction

Luxembourg is one of the main securitisation hubs in Europe. Its attractive and flexible legal and tax framework is tailored to fit the needs of investors and securitisation vehicles and provides a wide array of efficient structuring tools and eligible assets to carry out securitisations. Securitisation vehicles and the other market participants involved in structured finance transactions in Luxembourg enjoy a high degree of legal certainty achieved by a successful combination of a stable political and economic environment with the unique practical knowledge translated into business-friendly legal texts.

The change of the Luxembourg legal landscape in November 2023 brought about by the introduction of the Luxembourg law of 7 August 2023 on business preservation and modernisation of bankruptcy law (the **Restructuring Law**) has led the practitioners to carefully reassess the overall framework to ensure that it remains solid and reliable for the purpose of structured finance transactions in Luxembourg. A year later, it can now be concluded that, despite the new reorganisation proceedings introduced by the Restructuring Law to provide relief to debtors in financial difficulties, the security interests granted under the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended (the **Financial Collateral Law**), as well as the legal certainty under the Luxembourg law of 22 March 2004 on securitisation, as amended (the **Securitisation Law**) continue offering dependable tools to investors and practitioners. Proper structuring of the security package nevertheless becomes particularly important in view of these legislative developments.

The Restructuring Law is based on and implements the Directive (EU) 2019/1023 of the European Parliament and the Council of 20 June 2019 on preventive restructuring frameworks (the **Restructuring Directive**), which aims to align the substantive insolvency and reorganisation laws of all EU Member States by requiring them to put in place preventive restructuring procedures satisfying certain *de minimis* criteria. The Restructuring Directive aims to remove barriers to effective preventive restructuring of viable debtors in financial difficulties and to contribute to, among other things, minimising job losses and losses of value for creditors.

Structured Finance Transactions in Luxembourg

Securitisation transactions in Luxembourg are most frequently structured via a Luxembourg special purpose vehicle (an **SPV**), subject either to the Securitisation Law or to the general corporate law regime. Such SPV is usually financed by the issuance of debt instruments to or by contracting loans from the investors. The SPV would then use the proceeds of the financing to acquire on the market or to originate what are most commonly loan assets (loan, lease, trade or credit card receivables, mortgage loans etc), subject to the eligibility criteria in the financing documentation.

The SPV is normally structured to be bankruptcy remote. A Luxembourg SPV governed by the Securitisation Law (a **Luxembourg SV**) is often, though not always, set up for this purpose as an orphan vehicle held by a Dutch foundation (*stichting*) or an Anglo-American charitable trust, to reduce the risk of structural consolidation with the originator. To decrease the likelihood of bankruptcy, the financing documents usually include limited recourse and non-petition provisions, debt limitations and restrictions on the purpose and activities of the Luxembourg SV.

The security package most frequently consists of a pledge over the SPV's loan (or other) assets and bank accounts. It is not uncommon to also have a security interest over the economic interests (shares, notes and receivables) in the SPV.

The continuing enforceability of the security package and the bankruptcy remoteness of the SPV is thus of utmost importance for the financiers when arranging the deal.

The Reorganisation Procedures Introduced by the Restructuring Law

Although certain reorganisation proceedings (such as controlled management (*gestion contrôlée*) and composition with creditors (*concordat préventif de faillite*)) already existed in Luxembourg prior to the entry into force of the Restructuring Law, they were rarely used in practice, and barely adapted to the needs of the distressed companies. The purpose of the Restructuring Law was thus to introduce a viable alternative to such obsolete restructuring tools, in order to allow struggling debtors an opportunity to effectively revamp their financial structure, with or without supervision of the court, depending on their needs and creditors' interests involved. These new reorganisation proceedings under the Restructuring Law are meant to enhance the recovery rate of the businesses in temporary distress and prevent their bankruptcy, with the spillover beneficial effects to the stability of the Luxembourg economy.

Under the Restructuring Law, if the continuity of the debtor's business is jeopardised in the short or long run, it can, among other things, initiate judicial reorganisation proceedings for the purpose of: (i) obtaining a standstill (*sursis de paiement*) in order to enable an out-of-court arrangement with its creditors (*accord amiable*); (ii) obtaining a collective agreement of its creditors for the reorganisation plan via a court-driven process; or (iii) enabling a transfer of all or part of the debtor's enterprise by court order, for the purpose of maintaining its continuity. The latter can be also requested by a creditor or a person interested in the acquisition of the debtor's assets. The ultimate objective of the judicial reorganisation is, according to the Restructuring Law, the preservation of the continuity of all or part of the enterprise's assets or activities.

Inevitably, the potential for the long-term financial recovery of the debtor via judicial reorganisation proceedings comes at the short-term price of the effect such proceedings may have on the creditors' rights. Indeed, if the dissenting creditors were free to enforce their claims during the reorganisation, the very *raison d'être* of this new law would be undermined. For the reorganisation to be successful, a temporary suspense of the creditors' rights is vital. As such, under the Restructuring Law, the mere filing of the petition by the debtor with the court results in an immediate standstill on the enforcement actions by the creditors – the debtor cannot be declared bankrupt and the realisation of its assets is halted. Furthermore, and perhaps even more importantly, creditors cannot terminate any agreements or accelerate debt by reason of filing for the reorganisation proceedings by the debtor, despite any automatic termination or acceleration provisions customarily included in the financing documentation. The debtor may also unilaterally decide to suspend the performance of its contractual obligations for the duration of the stay, provided that such suspension is imperatively required for the judicial reorganisation. In the case of such suspension, the counterparty is entitled to put on hold the execution of its own contractual obligations but may not terminate the agreement.

If the petition for the opening of the judicial reorganisation proceedings is accepted by the court, the court sets the duration of the standstill at the maximum of four months, which can further be extended to up to 12 months.

Purpose and Personal Scope of the Restructuring Law

It is thus clear that the petition for and the opening of the judicial reorganisation proceedings with regard to a Luxembourg based debtor can temporarily frustrate the exercise of the creditors' rights under the financing documents. With this in mind, the first question to be asked when setting up a securitisation structure involving a Luxembourg SPV or otherwise a Luxembourg element is on the personal scope of the Restructuring Law.

On the first glance, there is very little leeway in the Restructuring Law in terms of its personal scope, as it covers with a broad brush all commercial companies, special limited partnerships (*SCSps*), entrepreneurs, artisans, as well as civil companies (*sociétés civiles*). Only the entities that are subject to a specific regulatory regime and supervision (e.g. credit institutions and investment firms, insurance and reinsurance undertakings, regulated investment funds, etc.) are carved out from its scope. Luxembourg SVs are also exempted from the Restructuring Law, but only on the provision that they are regulated by the *Luxembourg Commission de Surveillance du Secteur Financier* (*CSSF*).[1] As the prevailing majority of the Luxembourg SVs are not subject to the CSSF authorisation and supervision (at the date of this article only 29 such vehicles are regulated), this exception is unlikely to be a helpful fallback for a large bulk of the Luxembourg SVs.

However, in this context, it is interesting to point out that, according to the Restructuring Law, the ultimate purpose of any judicial reorganisation proceedings is to preserve the continuity of all or part of the enterprise's assets.[2] A question may arise on what does the concept of "enterprise" entail and whether it can serve, indirectly, as the limitation on the personal scope of the Restructuring Law.

A recent judgment of a Luxembourg court[3] (later sustained by the Court of Appeal)[4] has dissected this concept of "enterprise" in the context of the court-ordered transfer of assets procedure (a category of the judicial reorganisation proceedings under the Restructuring Law). This procedure allows the court to order the transfer of all or part of the enterprise or its activities if this is necessary to preserve their continuity,[5] at the request of the debtor or, in certain circumstances (notably if the debtor is in the state of bankruptcy), at the request of its creditor or of a person interested in the acquisition of such assets. In the case at hand, the process having been launched by a creditor, the debtor has argued that a demand for the transfer of all or part of the enterprise or of its activities should be declared inadmissible, in the absence of "enterprise", as the shares held by the debtor in another company do not constitute transferable "activities", within the meaning of the Restructuring Law. In its review of this argument, the court has namely equated the notion of "enterprise" with the existence of "economic activities" and has ruled, seeking analogy from, amongst others, the VAT-related legislation, that the mere holding of shares in a company does not constitute an economic activity (such as production of goods or provision of services) that would need to be preserved and would thus be transferable under the Restructuring Law.

Although this judgment only rules on the very specific procedure of the transfer of assets by court order (rather than generally any judicial reorganisation proceedings under the Restructuring Law), it is impossible not to draw a parallel between the wording of the provision of the Restructuring Law analysed by the court[6] and its more general clause[7] stating that the purpose of [any] judicial reorganisation proceedings is the preservation of the continuity of all or part of the enterprise's assets or activities. It is notable that both these provisions refer specifically to continuity of an "enterprise" as the ultimate objective. If the courts take the view that such notion requires production of goods or provision of services by the debtor (thus excluding mere holding companies) for the objective of the court-ordered transfer of assets proceedings to be attained, it would be difficult not to transpose the same logic to all judicial reorganisation proceedings in general, given the almost equivalent wording of the two provisions.

If the ultimate goal of any judicial reorganisation proceedings is the preservation of the continuity of all or part of the enterprise's assets or activities, it would be interesting to consider whether this purpose is compatible with the securitisation transactions carried by the Luxembourg SVs. Indeed, it is the view of the CSSF[8] that, in principle, a Luxembourg SV cannot engage in any activity likely to qualify the securitisation undertaking as an entrepreneur, such as, for example, the provision of services to third parties. Any management by the Luxembourg SV that creates increased risk in addition to the risk inherent to such assets or that aims to create additional wealth or promote the commercial development of the Luxembourg SV's activities would be incompatible with the Securitisation Law, even if the actual management has been delegated to an external service provider, although the amendments to the Securitisation Law introduced in 2022 now allow active management of debt securities, debt financial instruments and receivables, provided that the Luxembourg SV does not issue financial instruments to the public.

In the absence of legal certainty on this point and in view of the standstill associated with the judicial reorganisation proceedings, proper structuring of the security package becomes particularly important.

Effect on the Collateral Package

Security interests

Although the opening of the judicial reorganisation proceedings results in the standstill of any enforcement actions by the creditors, there is a major exception to this rule. Namely, the security interests granted under the Financial Collateral Law remain, in principle, enforceable. Indeed, the Luxembourg financial collateral arrangements have originally been intended by the legislator to be immune to the opening of any winding-up or reorganisation proceedings and their bankruptcy proof character embedded in article 20(4) of the Financial Collateral Law has again and again been confirmed by case law and doctrine. The Restructuring Law has reenforced this principle by extending the definition of the winding-up proceedings under the Financial Collateral Law (that the financial collateral arrangements are exempt from) to any collective proceedings that are terminated by collective consent (*accord collectif*) subject to the Restructuring Law. This exemption is in line with the objectives of the Restructuring Directive, which states in its recitals that, given the fact that the stability of financial markets relies heavily on financial collateral arrangements, the provisions of the Financial Collateral Directive[9] should apply, notwithstanding the provisions of the Restructuring Directive.

The Financial Collateral Law is applicable to financial instruments (defined in the broadest possible sense, including shares or securities equivalent to shares, units, bonds, other debt instruments, loan notes, convertible securities, instruments relating to financial underlyings, indices, commodities, precious metals, etc.) and receivables. Therefore, security interests over the shares, notes and receivables in the Luxembourg SPV and its Luxembourg bank accounts or any Luxembourg law security interests over the loan assets forming part of its portfolio fall within the protective harbour of the Financial Collateral Law.

Furthermore, the Financial Collateral Law extends its protection against any Luxembourg winding-up or reorganisation proceedings (including any judicial reorganisation proceedings under the Restructuring Law) also to any security interests governed by foreign law, provided that such security interests are similar to those falling within the scope of Financial Collateral Law and that the security provider is established in Luxembourg.

As such, even in the structures where the relevant SPV is located abroad and is held by a Luxembourg holding company, the creditors are likely to be protected against the risk associated with the Luxembourg judicial reorganisation proceedings by virtue of the security interests granted by the Luxembourg parent over its interests in the SPV, if such security interests are similar to Luxembourg financial collateral arrangements. Similarly, a UK or a US law security interest granted by a Luxembourg SPV over its portfolio consisting of financial instruments and/or loan assets is likely to be exempted from the prohibition on the enforcement actions during the standstill period under Restructuring Law, subject to the same caveat.

Nevertheless, it is important to keep in mind that the Financial Collateral Law aims to protect only the security interests proper (as well as the enforcement events, and the valuation and enforcement measures agreed upon by the parties in accordance therewith) and the scope of its protection does not extend to the underlying loan secured by such security interests. Hence, the obligations of a Luxembourg debtor arising under the underlying credit documentation (including the repayment obligations) can still be subject to the protective measures under the Restructuring Law.

Therefore, where a contractual trigger event for the enforcement of the security interest granted to secure the obligations of a Luxembourg issuer (or a borrower, as applicable) is the acceleration of the underlying debt (or otherwise the requirement to have the secured debt due and payable) and not merely an event of default, attention has to be paid to the fact that such acceleration (whether by any active steps or *ipso factum*) may be impossible, should such Luxembourg issuer or a borrower file a petition for the opening of the judicial reorganisation proceedings in Luxembourg. In such case, the contractual conditions for the enforcement of the security interest will not have been met and the enforcement may not be possible for the duration of the reorganisation proceedings.

With regard to the already existing financing arrangements, care needs to be paid to the fine print before jumping to a conclusion on the nature of the applicable trigger event. Most of the credit agreements allow the enforcement of the security interests upon the occurrence of an event of default without the need to have the secured debt due and payable (or accelerated). In other cases, what seems to be at first glance an acceleration-linked enforcement event in the pledge agreement may turn out to be something quite different (and more creditor friendly). The source of confusion is that such enforcement event is sometimes defined as a notice served by the agent under the provision titled "*Acceleration*" of the underlying facility agreement (or a similar wording to this effect). Despite the misleading title, such provision often merely contains a list of remedies available to the agent upon the occurrence of an event of default (including the enforcement of the security package) that can be used together or separately, at the option of the agent, and where the acceleration of the underlying debt is only an option and one of the available remedies rather than a pre-condition to the enforcement of the security interests.

Going forward, where the structure involves a Luxembourg issuer or borrower, trigger events in the security package (whether Luxembourg law governed or granted by a Luxembourg security provider) and the enforcement provisions in the underlying credit documentation need to be carefully reviewed and, where necessary, adjusted. In order to provide a higher degree of protection for the creditors and security takers, one of the options is to ensure that the enforcement triggers in the security package do not depend on the acceleration of the underlying debt and that the security interest can already be enforced at the occurrence of any event of default.

This approach was not new and had already been routinely used in the past before the entry into force of the Restructuring Law, in the so-called "*Double Luxco*" structures with financing provided at the level of a French borrower, in light of the risk of a *sauvegarde* procedure. Nowadays, the Luxembourg market seems to have adjusted to the new reality and, as a rule, there are few discussions on the necessity for this trigger event.

Nevertheless, if such option is not commercially viable, the petition for and opening of the reorganisation proceedings under the Restructuring Law (or any step in this connection by the debtor) can be included as additional independent triggers for the enforcement, alongside the acceleration of the underlying debt. Although the Restructuring Law does not permit the termination of the underlying credit agreements due to the initiation of reorganisation proceedings, the enforcement of the financial collateral arrangements at the occurrence of such trigger events should still be possible. Indeed, financial collateral arrangements (including the enforcement events agreed by the parties) remain, under the Financial Collateral Law, enforceable against third parties, commissioners, receivers, liquidators and other similar persons irrespective of any reorganisation measures and winding-up proceedings (including collective proceedings that are terminated by collective consent (*accord collectif*) subject to the Restructuring Law) and such proceedings do not constitute an obstacle to the enforcement of and performance by the parties of their obligations thereunder.

Furthermore, the Financial Collateral Law offers the parties full contractual freedom in determining the enforcement triggers. Although already the case since the conception of this legal act, this principle has been further emphasised by the law of 20 July 2022 amending the Financial Collateral Law, which has complemented the definition of the enforcement event by including the word "*whatsoever*", which currently reads "*"enforcement event" means an event of default or any other event* *whatsoever* *as agreed between the parties (…).*" Consequently, given the above and the character of the Financial Collateral Law as the *loi de police*, the enforcement of the financial collateral arrangement due to the initiation of the reorganisation proceedings under the Restructuring Law (where such trigger is included in the security agreement) should be possible.

Effect on the guarantees

Although the creditor may not be able to enforce its claims against the main debtor and despite the fact that, under Luxembourg law, certain personal guarantees can be accessory to the guaranteed debt, the Restructuring Law states that the co-debtors or the providers of personal guarantees do not benefit from the standstill (although natural persons that have issued a guarantee without guarantee may seek certain relief procedures). As such, in a securitisation structure, guarantees can normally be enforced in accordance with their terms, despite the reorganisation proceedings opened with regard to the main debtor, provided that such enforcement is contractually permitted.

Effect of the Restructuring Law on the Repurchase Agreements

A finance transaction can also take a form of a repurchase agreement (also known as a "repo"), where one party sells the financial instruments or other assets to another party, with the obligation to subsequently repurchase them at a pre-agreed higher price. Often, there may be some economic similarities between a repurchase transaction and a secured loan – where the purchase price received by the repo seller can be similar to a drawdown, transferred assets would serve as a collateral and the price differential would reflect the time-value of money (equivalent to accrued interest). In addition to the portfolio assets being transferred to the repo buyer on a buyback basis, the repurchase obligations of the repo seller can also be secured against its other assets (e.g. bank accounts) and/or the shares in the repo seller.

Despite the fact that the economics behind the repos, on one hand, and the secured loans, on the other hand, may sometimes be similar, the legal treatment of these two transactions is very different. Namely, unlike in a secured loan, where the ownership of its portfolio stays with the SPV and the lenders obtain a security interest over such portfolio, a repo involves an outright transfer of the legal title to the assets to the financiers, which are subsequently repurchased by the SPV at the agreed date.[10] Under the Financial Collateral Law, a repurchase transaction may concern any type of tangible or intangible assets. Furthermore, the Financial Collateral Law expressly states that the assignment and reassignment of an asset in the context of a repurchase transaction constitute an effective property transfer. The reassignment does not retroactively affect the proprietary rights of the transferee in the transferred asset during the term of the repurchase transaction, excluding thus a requalification risk, as far as Luxembourg law is concerned.

The treatment reserved for the repurchase agreements in the context of the Luxembourg judicial reorganisation proceedings and the associated risk of the financiers are also fundamentally different, as compared to the secured loan.

Unlike in a secured loan set-up, where only the pledge agreements securing the debt fall within the safe haven of the Financial Collateral Law but the secured debt itself, including its repayment and acceleration modalities, remains subject to all the pitfalls of the Luxembourg judicial reorganisation proceedings, in a repo transaction the repurchase agreement itself (and not only the security package) is in fact captured by the definition of a financial collateral arrangement under the Financial Collateral Law. As a result, repurchase agreements in their entirety, as well as the enforcement events and enforcement measures agreed by the parties therein, remain shielded from the risk pertaining to the judicial reorganisation proceedings, and such proceedings do not constitute an obstacle to the enforcement of and performance by the parties of their obligations thereunder, particularly in relation to their obligation to repurchase. Similarly to the security interests, the protection under by the Financial Collateral Law extends also to the repurchase agreements under foreign law where the defaulting party is established in Luxembourg.

In light of the above and given that the Financial Collateral Law allows the parties to freely determine the enforcement triggers, the acceleration of the repurchase date under the repurchase agreements upon the occurrence of a contractually agreed event of default (including upon the initiation of the reorganisation proceedings under the Restructuring Law) should be possible. As the repo buyer may enforce its rights to demand the repurchase of the acquired assets by the repo seller, irrespective of the standstill in the judicial reorganisation proceedings, the acceleration of the repurchase date as a trigger event for the enforcement of the security package securing the repo seller's repurchase obligations should not be problematic either, from the financier's perspective.

Non-petition Provisions

Aside from the effect of the Restructuring Law on the security package analysed above, one might also wonder if the bankruptcy remoteness of the SPV would be affected by the new reorganisation proceedings under the Restructuring Law. In particular, non-petition provisions customarily included in the financing documentation, pursuant to which the investors and creditors undertake not to file for bankruptcy of the SPV, come to mind in this respect.

Where the Luxembourg SPV is established as a securitisation vehicle under the Securitisation Law, such provisions are and remain enforceable by virtue of the law. Indeed, the Securitisation Law explicitly states that the articles of incorporation, the management regulations of a Luxembourg SV and any agreement entered into by the Luxembourg SV may contain provisions by which investors and creditors undertake not to seize the assets of the Luxembourg SV and not to petition for bankruptcy thereof or request the opening of any other collective or reorganisation proceedings against them. Furthermore, the Securitisation Law provides that any proceedings initiated in breach of such provisions shall be declared inadmissible. As such, a covenant by an investor or a creditor not to initiate judicial reorganisation proceedings against a Luxembourg SV should be enforceable and a Luxembourg court, if presented with such petition, should declare such petition inadmissible. In practice, such undertaking would of course be of little value, as the Restructuring Law has been designed primarily with the interests of the debtor in mind and, with the exception of the court-ordered transfer of assets, the judicial reorganisation proceedings can only be opened following a petition by a debtor.

Conclusion

To conclude, although new measures and tools introduced by the Restructuring Law are proving to be a success, with numerous reorganisation petitions having been submitted after its entry into force, the overall legal framework governing structured finance transactions in Luxembourg remains solid and reliable and, with proper structuring, will continue to offer dependable tools for creditors and security takers alike. Luxembourg's robust legislation ensures it remains in the front seat as one of the most competitive securitisation jurisdictions.

Endnotes

1 Under the Securitisation Law, only the securitisation undertakings that issue financial instruments offered to the public on a continuous basis are subject to the prior authorisation by the CSSF.

2 Article 12 of the Restructuring Law.

3 Judgment No 2023TALCH02/01569 of the District Court of Luxembourg, 2nd Chamber, of 18 December 2023, number TAL-2023-09111.

4 Judgment No 33/24 IV-COM of the Luxembourg Court of Appeal, 4th Chamber, of 27 February 2024, number CAL-2024-00014.

5 Article 55(1) of the Restructuring Law.

6 I.e. Article 55(1) of the Restructuring Law.

7 Article 12 of the Restructuring Law.

8 CSSF FAQ Securitisation, version 1, 23 October 2013.

9 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

10 Under the Financial Collateral Law, a repurchase transaction is defined as a transaction in which a transferor transfers to a transferee, against payment of a price, title to an asset and for which the obligation or option of a later retransfer of this asset or of an equivalent asset to the transferor for a pre-agreed price is agreed.

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Loyens & Loeff has a securitisation practice in Luxembourg that handles the structuring, regulatory and tax aspects of structured finance and securitisation transactions, including true sale and synthetic securitisation deals, collateralised loan obligations, commercial mortgage-backed securities, inventory securitisations, securitisation platforms and issuances of asset-backed securities. It has an outstanding record of representing issuers, originators and investors (including financial institutions, investment funds and large corporates) and working on both traditional and innovative securitisations involving various asset classes (for example, the first Islamic finance *sukuk* securitisation of IP rights). The team is part of a fully integrated firm with home markets in the Benelux and Switzerland, and offices in all major financial centres, such as London, New York, Paris, Zurich and Tokyo.

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