ALLEN & OVERY

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Restructuring Across Borders

Luxembourg: corporate restructuring and insolvency procedures

Contents

Introduction

The five principal restructuring and insolvency regimes for companies under Luxembourg law are:

- bankruptcy (*faillite*)
- controlled management (*gestion contrôlée*)
- composition in order to avoid bankruptcy (*concordat préventif de la faillite*)
- reprieve from payment (*sursis de paiement*)
- compulsory winding-up

Bankruptcy (*faillite*)

Where a company has ceased to make payments, is unable to meet its commitments (*cessation des paiements*) and has lost its creditworthiness (eg loss of ability to obtain credit or new moneys) (*ébranlement du crédit*), the court in the district in which the company has its principal place of business may declare the company bankrupt either:

- upon acknowledgement by the company;
- at the request of a creditor; or
- upon its own initiative.

The general purpose of the bankruptcy procedure is to realise the assets of the debtor and to distribute the proceeds to its creditors.

From the date of the bankruptcy order up to the date of the closing of the bankruptcy proceedings, the bankrupt company and its directors lose control of the administration of the company and the ability to deal with its assets. These tasks are entrusted to one or more receivers (*curateurs*) appointed by the court.

In addition, the making of the order removes the right of creditors to obtain individual enforcement of their rights against the debtor. They must submit all their claims to the appointed receiver.

Controlled management (*gestion contrôlée*)

Controlled management is a remedy granted by the court to protect a company which has lost its creditworthiness or which is experiencing difficulties in meeting all of its commitments. The purpose of controlled management is to assist a company in reorganising its business or in converting its assets into cash under the supervision of the court and of court-appointed commissioners and with the approval of the creditors.

As mentioned above, the company is placed under the control of the court and the commissioners. The directors continue to manage the business of the company, but they are no longer allowed to act without the authorisation of the commissioners. The commissioners also have the power to compel the company to take certain actions.

The commissioners are entrusted with the preparation of a plan for the reorganisation of the undertaking or for the realisation of the assets. This plan is submitted to the creditors who vote on it. If approved by a majority in number of all the creditors, representing more than 50% of the overall amount of the creditors' undisputed claims, the plan will be presented to the court for approval.

Composition in order to avoid bankruptcy (*concordat préventif de la faillite*)

A composition is an agreement between a company experiencing financial difficulties and its creditors, the purpose of which is to avoid bankruptcy. The agreement is made under the control, and with the approval, of the court.

The agreement (which is to be negotiated by the debtor company and its creditors) may take various forms. For example, it may consist of an extension of the time for the payment of debts, reimbursement of part of the claims by means of a lump sum payment or the partial reimbursement of the debts by instalments.

The application for the composition must be supported by a majority in number of the (unsecured) creditors representing three-quarters of the outstanding (unsecured) amounts. After ratification by the court, the composition will be binding on all unsecured creditors and those secured creditors who have waived their rights of priority.

While a composition is under negotiation, the debtor is unable to dispose of, or grant any security over, any assets without the approval of a judge. After ratification of the composition, the debtor can again conduct its business without any restrictions, save for those restrictions provided for in the composition agreement.

Although it has never been formally abolished, the procedure of composition in order to avoid bankruptcy has rarely been used in practice, since: (i) it appears to be difficult for a debtor to meet the conditions necessary for implementing the procedure; and (ii) it does not provide for full protection against enforcement proceedings brought by secured and privileged creditors.

Reprieve from payment (*sursis de paiement*)

The reprieve from payment procedure is available to a company experiencing financial difficulties. Its purpose is to allow such company to suspend its payments for a limited period of time. Reprieve from payment acknowledges and ratifies, by means of a court order, an agreement which has been reached with the creditors of the company (by a majority in number of the concerned unsecured creditors, representing three-quarters of the outstanding unsecured amounts).

The reprieve from payment, however, only applies to those commitments which have been assumed by the debtor prior to obtaining the court order and has no effect as far as secured claims or taxes and other public charges are concerned.

During the time for which a reprieve from payment is in force, the beneficiary of the reprieve loses the right to administer its assets and is only allowed to manage its business under the control of court-appointed commissioners.

As with the composition in order to avoid bankruptcy, the reprieve from payment has rarely been used in practice.

Compulsory winding-up

Compulsory winding-up is governed by Arts 203 and 203-1 of the Act of 10 August 1915 relating to commercial companies, as amended (the **Companies Act**).

The purpose of a compulsory winding-up is to terminate a company, or any establishment of a foreign company, which pursues activities which infringe criminal laws or which seriously contravene the laws applicable to commercial companies, including laws relating to the establishment of businesses (eg where the company has no known place of business, the directors of the company have resigned and no new directors have been appointed, the annual accounts of the company have not been prepared and published in accordance with the law, etc).

Compulsory winding-up is ordered by the court upon application of the public prosecutor. A supervising judge and one or more liquidators will be appointed and may determine the way in which the liquidation is to proceed, and the extent to which, if at all, the rules governing bankruptcy proceedings should be made applicable.

However, compulsory winding-up is not strictly speaking an insolvency procedure (although it generally has the same effect).

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding up proceedings - secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, bankruptcy (*faillite*), controlled management (*gestion contrôlée*) and composition in order to avoid bankruptcy (*concordat préventif de la faillite*) were available as main proceedings under the Original Regulation.

Bankruptcy (*faillite*) was also available as a secondary proceeding under the Original Regulation.

Under the Recast Regulation, bankruptcy (*faillite*), controlled management (*gestion contrôlée*) and composition in order to avoid bankruptcy (*concordat préventif de la faillite*) are listed in Annex A.

Further information

For further information on Luxembourg restructuring and insolvency procedures, we would refer you to the Sweet & Maxwell book "European Cross Border Insolvency", edited by Allen & Overy. To purchase a copy of this book, please visit sweetandmaxwell.co.uk.

Allen & Overy has launched an online service for clients focusing on debt restructurings and insolvency issues. Developed by Allen & Overy's market-leading Restructuring group, "Restructuring Across Borders" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe and the U.S.

To request access for your organisation, please contact your usual Allen & Overy contact, or email: rab@allenovery.com.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

Pierre Schleimer

Partner

Tel +352 44 44 55 310
pierre.schleimer@allenovery.com

Henri Wagner

Partner

Tel +352 44 44 55 409
henri.wagner@allenovery.com

Bénédicte Kurth

Counsel – PSL

Tel +352 44 44 5 5718
benedicte.kurth@allenovery.com

Ian Field

Partner

Tel +44 20 3088 2671
ian.field@allenovery.com

Jennifer Marshall

Partner

Tel +44 20 3088 4743
jennifer.marshall@allenovery.com

Lucy Aconley

Senior PSL

Tel +44 20 3088 4442
lucy.aconley@allenovery.com

Nicola Ferguson

Senior PSL

Tel +44 20 3088 4073
nicola.ferguson@allenovery.com

Allen & Overy, société en commandite simple

33 avenue J.F. Kennedy, L-1855 Luxembourg, PO Box 5017

L-1050, Luxembourg

Tel + +352 44 44 55 1

Fax + +352 44 44 5222

Allen & Overy LLP

One Bishops Square, London E1 6AD,

United Kingdom

Tel +44 20 3088 0000

Fax +44 20 3088 0088

www.allenovery.com

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