
THE RESTRUCTURING REVIEW

SECOND EDITION

EDITOR
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH

THE RESTRUCTURING REVIEW

SECOND EDITION

Reproduced with permission from Law Business Research.

This article was first published in The Restructuring Review,
(published in October 2009 – editor Christopher Mallon).

For further information please email
Adam.Sargent@lbresearch.com

THE
RESTRUCTURING
REVIEW

SECOND EDITION

Editor

CHRISTOPHER MALLON

LAW BUSINESS RESEARCH LTD

PUBLISHER
Gideon Robertson

MARKETING MANAGER
Adam Sargent

EDITORIAL ASSISTANT
Nick Drummond-Roe

PRODUCTION EDITOR
Jonathan Cowie

SUBEDITORS
Jonathan Allen
Kathryn Smuland
Ariana Frampton

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2009 Law Business Research Ltd

© Copyright in individual chapters vests with the contributors

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2009, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

www.thelawreviews.co.uk

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET HAAVIND AS
AFRIDI & ANGELL
ANDREAS NEOCLEOUS & CO LLC
BAIÃO, CASTRO & ASSOCIADOS – SOCIEDADE DE ADVOGADOS
BAKER & MCKENZIE
CHIOMENTI STUDIO LEGALE
COLLAS DAY
DREW & NAPIER LLC
DUNDAS & WILSON LLP
ENGARDE ATTORNEYS AT LAW
GARRIGUES
GÖRG LAWYERS
GÜR LAW FIRM
HAMILTON ADVOKATBYRÅ
JISUNG HORIZON ATTORNEYS AT LAW
KROMANN REUMERT
KURI BREÑA, SÁNCHEZ UGARTE Y AZNAR, SC
KYRIAKIDES GEORGOPOULOS & DANIOLOS ISSAIAS LAW FIRM
LORENZ
OLANIWUN AJAYI LP
OOSTVOGELS PFISTER FEYTEN
OPPENHEIM
REBAZA, ALCÁZAR & DE LAS CASAS, ABOGADOS FINANCIEROS
SCHELLENBERG WITTMER
SERGIO BERMUDEZ LAW OFFICE
SCHÖNHERR RECHTSANWÄLTE GMBH
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
SONIER & ASSOCIÉS
WILLIAM FRY

CONTENTS

Prefacevii
	<i>Christopher Mallon</i>
Chapter 1	AUSTRIA..... 1
	<i>Wolfgang Höller</i>
Chapter 2	BELGIUM..... 11
	<i>Steven De Schrijver and Thomas Daenens</i>
Chapter 3	BRAZIL22
	<i>Bruno Pedreira Poppa</i>
Chapter 4	CYPRUS.....32
	<i>Maria Kyriacou</i>
Chapter 5	DENMARK43
	<i>Teis Gullitz-Wormslev and Maria Høyer Levin</i>
Chapter 6	ENGLAND & WALES57
	<i>Christopher Mallon, Christian Pilkington and Alex van der Zwaan</i>
Chapter 7	FRANCE77
	<i>Caroline Texier and Gabriel Sonier</i>
Chapter 8	GERMANY.....86
	<i>Christian Bärenz and Carsten Müller-Seils</i>
Chapter 9	GREECE97
	<i>Leonidas C Georgopoulos and Christina C Papanikolopoulou</i>

Chapter 10	GUERNSEY	108
	<i>Jason Romer</i>	
Chapter 11	HUNGARY	119
	<i>Mihaly Barcza</i>	
Chapter 12	IRELAND	127
	<i>Michael Quinn</i>	
Chapter 13	ITALY	137
	<i>Andrea Bernava, Giulia Battaglia and Antonio Tavella</i>	
Chapter 14	JAPAN	154
	<i>Shinichiro Abe</i>	
Chapter 15	KOREA	172
	<i>Sung Jun Hong</i>	
Chapter 16	LUXEMBOURG	184
	<i>Martine Gerber-Lemaire</i>	
Chapter 17	MEXICO	196
	<i>Manuel Aznar Nicolín</i>	
Chapter 18	NIGERIA	204
	<i>Muyiva Balogun, Wolemi Esan and Khadija Belgore</i>	
Chapter 19	NORWAY	223
	<i>Ylva Cornelia Daniëls</i>	
Chapter 20	PERU	237
	<i>José Jiménez Chocano</i>	
Chapter 21	PORTUGAL	250
	<i>Ana Paula Matos Martins and Maria José Andrade Campos</i>	

Chapter 22	SCOTLAND	262
	<i>David Gibson and Ainslie Mackenzie</i>	
Chapter 23	SINGAPORE	280
	<i>Sushil Nair</i>	
Chapter 24	SPAIN.....	296
	<i>Antonio Fernández, Borja García-Alamán, Adrián Thery and Juan Verdugo</i>	
Chapter 25	SWEDEN	307
	<i>Lars Eric Gustafsson, Dag di Meo and Tomas Johansson</i>	
Chapter 26	SWITZERLAND	324
	<i>Vincent Jeanneret, Olivier Hari and Elena Sampedro</i>	
Chapter 27	TURKEY	340
	<i>Oytun Şemaki and Işık Karlık</i>	
Chapter 28	UKRAINE.....	349
	<i>Andriy Vysbnevsky</i>	
Chapter 29	UNITED ARAB EMIRATES	358
	<i>Bashir Ahmed and Aly Shah</i>	
Chapter 30	UNITED STATES.....	369
	<i>Sally McDonald Henry and Bennett Silverberg</i>	
Appendix 1	ABOUT THE AUTHORS	397
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	417

PREFACE

We are very pleased to present this second edition of *The Restructuring Review*. As with the first edition, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions that have been prevailing in the global restructuring market in 2008/2009 and to highlight some of the more significant legal and commercial developments and trends during that period.

It is widely acknowledged that the global economy is now in the midst of the worst financial crisis since the Great Depression. As readers will have experienced, the past year has seen credit conditions deteriorate further, global asset prices continue to fall and distressed banks reach out for government support. The effects of the current global recession have been enormous: unemployment figures have risen sharply worldwide and economic growth has stagnated. Considerable uncertainty remains as to how best to remedy the current weaknesses in our economic system that have made the downturn so severe.

Although the main stock markets have shown some signs of recovery recently, there is no consensus as to how long this surge will continue and therefore how long this recession will be with us. As banks face the dual obstacles of revenue pressures and rising credit impairments, together with national economies facing fiscal tightening, talk of ‘green shoots of recovery’ in the short to medium term appears premature. In the meantime, it is nevertheless clear that the hostile environment businesses still confront will produce further technical and commercial issues that companies, legislators and practitioners will, of necessity, have to tackle together.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

Christopher Mallon

Skadden, Arps, Slate, Meagher & Flom LLP

London

October 2009

Chapter 16

LUXEMBOURG

*Martine Gerber-Lemaire**

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

Positioned in the heart of Europe, Luxembourg is a jurisdiction that has long been recognised as an attractive, well-regulated financial centre for businesses and individuals alike. It boasts the leadership of a government that is renowned for its pro-business attitude, open international culture and for continuously taking steps to maintain the underlying stability of its financial centre. The jurisdiction has always been subject to a relatively healthy climate and today represents the world's second-largest investment fund centre after the US with 3,435 funds domiciled as of end June 2009.

The recent stresses in the global financial markets, however, have hit many economies hard. While at first Luxembourg seemed to be shielded from the catastrophes abroad, the jurisdiction has since felt the tremors, although to a lesser extent than many other economies. To ensure Luxembourg remains strong, the government and market participants have actively been taking significant steps and drawing upon existing tools in an effort to revitalise liquidity while stabilising and maintaining confidence. Luxembourg has been quick to act and is working hard to build secure foundations not only for now, but importantly, for the relatively new world following the post-crisis era.

Luxembourg's financial environment has been tarnished in some particular areas. 2008 was a difficult year for the banking industry with lower profits and lower valuations, to name a few problems. Institutions within the sector have attracted attention predominantly as a result of major restructuring programmes implemented for major banks such as Fortis and Dexia, among others, as well as the fall of the three Icelandic banks that were subject to the fate of their parents.

* Martine Gerber-Lemaire is a partner at Oostvogels Pfister Feyten. This article was written in collaboration with Christel Dumont, counsel, and Elodie Simonian, junior associate, at Oostvogels Pfister Feyten.

The investment fund industry has also hit the headlines following the Lehman Brothers bankruptcy and further aggravated by the infamous Madoff case. Specifically, the effect on Luxembourg UCIs (Undertakings for Collective Investment) on the back of the latter amounted to approximately €1.9 billion (i.e., 0.15 per cent of global net assets of UCIs in November 2008) – however, as announced by the Luxembourg regulatory authority, Commission de Surveillance du Secteur Financier (‘the CSSF’), the Luxembourg UCI industry registered a positive variation amounting to €26,337 billion during May 2009. Other areas of the Luxembourg economy have also been affected: an increase of approximately 25 per cent in bankruptcy cases ruled by the Commercial Court has been observed over the first five months of 2009.

Against this backdrop, restructuring and insolvency have clearly been brought into the spotlight, which in turn makes it even more essential to have a sound understanding of what various jurisdictions can offer. The level of debt together with lower business valuations and limited access to capital markets has made restructuring both necessary and inevitable, and in this respect the remainder of 2009 and beyond is likely to bring consolidation and restructuring in many sectors, especially as the current market is not in a position to support the level of underperforming businesses. In Luxembourg, most cases are unique and can be highly complex, involving a large number of parties. As the ultimate aim is to achieve the best economic solution, each restructuring is, therefore, treated on a case-by-case basis. Further, Luxembourg has a long-standing history as a credible structuring platform and will be focusing on and developing its core strengths to help revitalise liquidity and confidence across the global markets.

Moreover, Luxembourg’s pragmatic approach and its adherence to international initiatives and standards will be important drivers in overcoming the financial hurdles that the world presently faces. An array of new schemes such as government investments and guarantees as well as protection schemes for investors have been initiated. In March 2009, the Luxembourg Prime Minister Jean-Claude Juncker outlined a number of socio-economic tax and environmental steps to help overcome the effects of the financial crisis. The government is aiming to provide financial assistance to businesses and to make credit insurance available through the national export credit agency. The country will continue to conduct a prudent budgetary policy and remains fully focused on the pact for growth and stability.

Also of particular note is that the OECD has confirmed that Luxembourg is now considered a fully cooperating jurisdiction in the field of exchange of information in tax matters, moving the jurisdiction into the ‘white list’. This is based on the progress made by the Luxembourg government to effectively renegotiate some of its existing tax treaties to comply with ‘internationally agreed tax standards’ in the field of exchange of information. This is a key development for Luxembourg and any businesses involved with the jurisdiction.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Commercial sector

a Reorganisation procedures

The following restructuring procedures are available in Luxembourg: controlled management, reprieve from payments and composition with creditors to avoid bankruptcy. In the past, these were rarely applied in practice, but this year similar procedures for the financial sector have been used more extensively. As a result, the court and the companies will certainly be more open-minded towards reorganisation procedures in the 2009 recovery context.

According to the Grand-Ducal Decree dated 24 May 1935, controlled management may be applied where the company is either unable to raise credit or unable to meet its commitments. The court grants this procedure only when it appears that the business of the company may be resumed and the company may be rescued later on.¹

Controlled management allows an entity to reorganise its business or realise its assets under the supervision of the court and the court-appointed commissioner. It is the commissioner's task to draw up a reorganisation plan, which will then be subject to approval by a majority of creditors and ratification by the court prior to becoming compulsory.

Articles 593 and following of the LCC set forth the general rules governing reprieve from payments proceedings. Reprieve from payments will only be granted by the court if the company concerned is temporarily unable to pay creditors, but an audited balance sheet demonstrates that assets largely exceed debts.

The law of 14 April 1886 as amended sets forth the provisions related to composition with creditors to avoid bankruptcy. Two cumulative conditions shall be met: the company shall face financial difficulties that cannot be overcome and the applicant must obtain the agreement of the majority of the creditors representing at least three-quarters of the business entity's debt.

The primary objective of the Luxembourg restructuring procedures is to overcome the company's financial difficulties based upon the creditors' agreement. However, they are complex, and the applicable legal provisions are old-fashioned. They entail a large number of actions and involve the intervention of many different parties, thereby making the proceedings arduous and time-consuming. It should also be pointed out that there is no real culture of a fresh start in Luxembourg. This may explain why this option is often rejected by the court, and on the rare occasion it is granted by the court, it is often unsuccessful in practice and ends in bankruptcy proceedings.

b Bankruptcy

The bankruptcy procedure applicable in Luxembourg is the most common insolvency proceeding.

1 See Court of Appeal Luxembourg, 9 July 1980, *WB/Halubek Associates*.

The bankruptcy procedure can be initiated at the request of any creditor, at the company's request, or by the court acting on its own motion, if it has been provided with relevant information of the company's financial difficulties.

Bankruptcy is declared by means of a judgment of the Tribunal d'Arrondissement sitting in commercial matters, if both of the following conditions are fulfilled:

- a* the debtor's credit is compromised (i.e., the debtor can no longer raise credit either from banks, providers or its owners); and
- b* the company has stopped paying its debts.²

One of the main effects of the opening of bankruptcy proceedings is that it precludes the bankrupt company's directors from engaging in the management and administration of the company's assets.

The court will, therefore, appoint a bankruptcy receiver, who will act, under the supervision of a *juge-commissaire* appointed by the court from among its members, in his or her capacity as a representative of both the insolvent company and the mass of creditors.³

On the one hand, the assets of the business entity shall be managed by the bankruptcy receiver and divided between the creditors, taking into consideration their respective privileges and rank. On the other, all of the bankrupt's passive debts become receivable as from the judgment declaring the bankruptcy, while the bankrupt is at the same time deprived of the benefit of the expiration date.⁴ The interests attached to any debt not guaranteed by a privilege, collateral or a mortgage shall be stopped with respect to the mass of creditors.⁵ Legal actions filed by creditors to seize the debtor's property are suspended as from the judgment date.

In addition, as a general rule, the bankruptcy also prevents the creditors from acting separately against the bankrupt debtor.⁶

Hence, the role of the bankruptcy receiver is not to manage the bankrupt company as a going concern, but to realise the assets of the company and pay off its debts to the largest extent possible.

c *Specific issues*

Taking and enforcement of securities

Pledges, assignments as security, and repurchase agreements constitute financial instruments⁷ ("financial collateral instruments") and are governed by the Law on Financial Collateral Arrangements dated 5 August 2005 ("the Financial Collateral Law").

2 Article 437 Luxembourg Commercial Code ("the LCC").

3 Article 444 LCC.

4 Article 450, Paragraph 1 LCC.

5 Article 451, Paragraph 1 LCC.

6 Article 452, LCC.

7 It may be outlined that the Financial Collateral Law has wider possible application, and not only applies to securities, derivatives of any nature or monetary instruments, but also comprises title deeds, title claims and cash claims.

From an innovative perspective, the Financial Collateral Law introduced the possibility of granting security on present or future assets, determined or not,⁸ even on third parties' assets,⁹ and in favour of security trustees,¹⁰ which last feature rendered the recourse to parallel debt provisions useless. But above all, the Financial Collateral Law created an exception regime which increases the legal security for collateral takers in insolvency proceedings against their collateral providers.¹¹

The Financial Collateral Law ensures that national and foreign insolvency procedures and reorganisation measures do not affect the enforceability of financial collateral instruments.¹² The law forbids the commissioner, liquidator or bankruptcy receiver from setting the collateral aside. Such prohibition also applies to foreign insolvency procedures, and is qualified in the parliamentary report to the Financial Collateral Law ('the Report') as a policy rule. In other words, if the pledge agreement is validly contracted between the parties, it will be opposable to them and to third parties and fully enforceable after bankruptcy.

The Financial Collateral Law contains the same provisions of set-off and close-out netting terms, and makes them valid and enforceable against third parties, bankruptcy receivers and liquidators, notwithstanding the commencement, continuation or reorganisation measures or insolvency proceedings.

In a recent decision concerning *Landsbanki*,¹³ the Luxembourg court had the opportunity to confirm the application and validity of such provisions.

Duties of directors of companies in financial difficulties

One of the main legal duties of directors of a company (which stops payments and whose credit is compromised) is to file a petition for bankruptcy with the commercial court within one month from the date when the company became insolvent.

Where a director fails to comply with this obligation, or if he or she has incurred liability for actions taken by him or her before the declaration of bankruptcy, he or she could incur specific liability.

8 Article 4 of the Financial Collateral Law applies to financial instruments, as defined in the Financial Collateral Law, as well as to any kind of receivables, without any limitation.

9 Article 7 of the Financial Collateral Law institutes the assumption that the pledgor is the owner of the financial collateral instruments to be pledged. Excluding where a pledgee has been previously informed in writing, that the pledgor is not the owner of the financial collateral instruments, a created pledge will remain valid. If the pledgee has been duly informed, the pledge will remain valid upon confirmation of the pledgor that the owner agreed to such pledge. This provision applies to any security interest that may be created under the Financial Collateral Law.

10 Article 2 (4) of the Financial Collateral Law.

11 Article 20 (4) of the Financial Collateral Law.

12 Article 20 of the Financial Collateral Law.

13 Tribunal d'Arrondissement of Luxembourg, 29 October 2008 No. 1314/08, *Landsbanki Luxembourg S.A.*

Clawback actions

The court shall, while pronouncing the bankruptcy, determine the moment from which the company is deemed to have been insolvent (cessation of payments). Such date can be set up to six months, plus 10 days, prior to the declaration of bankruptcy by the relevant court. The period from the date so determined until the bankruptcy declaration is referred to as the preference period.¹⁴ Certain transactions undertaken during the preference period must be challenged by the bankruptcy receiver.

The following transactions must be declared null and void by a court decision, if they were undertaken during the preference period:¹⁵

- a* disposition of the assets without consideration of material adequacy;
- b* payments of debts that had not fallen due, whether the payment was in cash or by way of assignment, sale, set-off, or by any other means;
- c* payments of debts that had fallen due by any means other than in cash or by bills of exchange, and
- d* mortgages granted to secure pre-existing debts.

Any other payments made by the debtor that have fallen due, and any other transactions entered into during the preference period, may be declared null and void if the bankruptcy receiver can prove that the persons receiving payment from the debtor (or the persons entering into a transaction) were aware of the cessation of payments.¹⁶

Finally, there is a general principle that all acts or payments made to defraud the creditors will be declared null and void, regardless of the date when they were made.¹⁷

ii Restructuring and insolvency proceedings applying to entities within the insurance and financial sectors

In Luxembourg, restructuring of entities within the financial sector is mainly governed by Articles 60 and 61 of the Law on the Financial Sector of 5 April 1993 ('the LSF').¹⁸ Insolvency proceedings in the insurance sector are ruled by Articles 55 to 61 of the Law of 6 December 1991.¹⁹ Insurance company liquidation is not discussed in this chapter, as it appears that this has never occurred in Luxembourg. However, the applicable rules are substantially the same as the ones provided in the credit institutions regime of insolvency.

14 Article 442 LCC.

15 Article 445 LCC.

16 Article 446 LCC.

17 Art. 448 LCC.

18 The law of 5 April 1993 on the financial sector (Mémorial A, 18 November 1993, No. 164, p462) has been amended by the law of 19 March 2004 (Mémorial A, 29 March 2004, No. 45, p707).

19 Mémorial A, 23 December 1991, No. 84, p1762, as amended by the law dated 11 March 2004 (Mémorial A, No. 44, 29 March 2004, p696), implements Directive 2001/17/EC of 19 March 2001 on the reorganisation and winding up of insurance undertakings.

The LSF's sole reorganisation proceeding to date is the suspension of payments.²⁰

Suspension of payments may be initiated where the establishment is unable to raise credit, whether or not it is also unable to pay creditors, and where the establishment is unable to meet its commitments. Additionally, the opening of this type of procedure may result from a judicial situation, where the authorisation required to act as a professional of the financial sector has been withdrawn and the withdrawal decision has not yet become final.

Apart from bankruptcy proceedings, suspension of payment may be granted where the establishment is able to pay its creditors. Even if both proceedings entail suspension of payments, this procedure should be distinguished from the reprieve from payments proceedings provided for by the LCC.²¹

Only the Luxembourg financial sector's regulatory authority, the CSSF, or the concerned establishment, are entitled to apply for suspension of payments (not the creditors). Only the above-mentioned entities are entitled to lodge an appeal against the court decision held on this matter.²²

The main legal effect of the opening of such a procedure is that all payments are suspended except those required by the liquidation proceedings.²³ The lodging of the request by the establishment or the notification made by the CSSF prohibits the establishment from taking any actions other than precautionary and protective measures, unless expressly authorised by the CSSF or by any legal provision to the contrary.

Any member of an administrative, executive or management body who contravenes such legal provisions may be subject to criminal sanctions, and any contravening act would be void.

The aim of this measure is to ensure that the establishment's financial situation does not deteriorate and to grant sufficient time to such legal body to cope with its financial difficulties.

If it appears that the business of an entity within the financial sector cannot be resumed or pursued in accordance with the suspension of payment proceedings, as described above, the second procedure available under the LSF is the judicial

20 For a wider development in this issue, see Marc Elvinger, 'Enseignements jurisprudentiels récents en matière de sursis de paiement dans le secteur financier', ALJB – Bulletin Droit et Banque No. 43.

21 See Court of Appeal of Luxembourg, 28 January 2009 No. 34,351 available on www.aljb.lu where the court ruled that the suspension of payments proceedings provided for by Articles 60-2 and following of the LSF is autonomous from the reprieve from payments procedure governed by Articles 593 and following of the LCC.

22 See decision No. 451/09 of 1 April 2009: in the decision granting Lehman Brothers (Luxembourg) SA suspension of payments, the court considered that this provision does not constitute a breach of the right to have a fair trial as it is justified by the need to ensure a proper justice administration.

23 Decision of 10 February 2009, No. 183/09.

liquidation, and dissolution of the establishment. This goal can also be achieved through a restructuring plan drawn up by several parties involved and ratified by the judge.

Once the judicial liquidation has been opened by the court, the court appoints a *juge-commissaire* from among its members and a liquidator. The court also grants the commissioner the right to appoint a creditor's committee to assist with and supervise the work performed by the liquidator. In a judicial liquidation, the court determines to what extent the rules governing bankruptcy shall apply.

iii Restructuring and insolvency proceedings applying to UCIs

The rules related to a UCI's liquidation proceedings are mainly governed by the Law of 20 December 2002 ('the 2002 Law'), and depend on the type of UCI at issue: incorporated investment companies ('SICAV' and 'SICAF') or a contractual scheme (Fonds Commun de Placement, 'FCP').²⁴

There are three types of dissolution applying to both investment companies and contractual schemes, but only one concerns insolvent UCIs: the judicial dissolution.²⁵

Under the 2002 Law, the judicial dissolution is restricted to three specific cases, specifically framed for investment companies:

- a* when a UCI does not apply for registration with the CSSF within one month from the date of its incorporation;²⁶
- b* where there is an unconditional refusal by the CSSF of the registration of a UCI;²⁷ and
- c* in the event of an unconditional withdrawal of a UCI's registration from the CSSF's list.²⁸

Only the Public Prosecutor, *ex officio*, or at the request of the CSSF,²⁹ is allowed to ask for judicial liquidation. The investors are not entitled to request a judicial liquidation, but are permitted to make an informal request to the CSSF to investigate, thus enabling the CSSF to request the Public Prosecutor to act if the facts warrant it.

The withdrawal of a SICAV or a SICAF from the CSSF's list automatically leads to suspension of payments by the UCI³⁰ and a prohibition from taking any measures, other than protective measures, except by authorisation of a 'supervisory commissioner'.

24 FCP means any undivided co-ownership of securities managed in accordance with the risk principle spread between owners who have limited liability and whose rights are represented by units intended to be placed in the public.

25 For a detailed overview of the legal provisions governing UCIs, see 'Collective investment schemes in Luxembourg: law and practice', Claude Kremer and Isabelle Lebbe, Oxford University Press, 2009.

26 Article 104(11) of the 2002 Law; Article 47(11) of the Law of 13 February 2007.

27 Article 104(1) of the 2002 Law; Article 47(1) of the Law of 13 February 2007.

28 *Ibid.*

29 *Ibid.*

30 Redemption of shares is no longer possible. Please also see Tribunal d'Arrondissement of Luxembourg, 30 April 2009, No. L-6089/09, *Luxembourg Investment Funds SICAV*.

The decision of the CSSF only becomes final once the delay for administrative recourse against the CSSF decision has elapsed, and then the Luxembourg court pronounces formally the judicial liquidation of the UCI. The court may use its discretion, and decide to apply the general law relating to commercial companies (voluntary liquidation of a solvent company), but usually the court requests the combined application of commercial bankruptcy rules, with some specific rules of the Company Act in relation to voluntary liquidation.

Once the judicial liquidation of the UCI is opened, the appointed liquidators analyse the situation, review creditors' claims, realise assets and pay debts. Finally, the liquidator closes the judicial liquidation and, if possible, distributes to shareholders their due share in the net asset value of the liquidated company.

In the recent Madoff-related cases where the dissolution and liquidation of Luxalpha SICAV, Herald (LUX) SICAV, and Luxembourg Investment Funds SICAV were ordered,³¹ the court quoted certain principles:

- a* the liquidators' powers will be exercised in Luxembourg and abroad pursuant to the unity and universality principles of the judicial dissolution of a company having its registered office in Luxembourg. These rules apply to all moveable property and immoveable property of the liquidated company, even if these properties are abroad;
- b* the shareholders are not creditors and, therefore, they do not have to produce a claim to the judicial liquidators. They will be informed once a year by the liquidators and for the first time through a shareholders' meeting to be held within six months of the judgment date; and
- c* the shareholders (investors) of the companies liquidated shall be considered as shareholders who will share the surplus of the liquidation.

III RECENT LEGAL DEVELOPMENTS

i Legislative changes

No legislative changes occurred in 2008 and 2009.

ii Case law and interpretation of the law

UCIs

About seven judicial liquidations were pronounced in the 'Madoff fund cases'. At this stage, it is too early to determine how the Luxembourg courts will apply the 2002 Law in relation to the three most recent Madoff-related judicial liquidations.

However, an interesting interpretation of the 2002 Law was made in relation with Top Ten Multifonds and Amis Funds Sicav, liquidated on 23 December 2005, where it was decided by the Commercial Court to change the modality of liquidation through

31 Tribunal d'Arrondissement of Luxembourg, 2 April 2009, No. L-6033/09 (*Luxalpha*), Tribunal d'Arrondissement of Luxembourg, 2 April 2009, No. L-6032/09 (*Herald*) and footnote 30 for *Luxembourg Investment Funds SICAV*.

a subsequent judgment.³² This is possible under the 2002 Law,³³ but in these specific cases, the purpose was to consider the investors as ‘creditors’, because the net asset value was falsified, fictitious and impossible to calculate exactly afterwards. Therefore, the liquidators had to examine the investors’ claims and take into account the invested amount, less those amounts reimbursed, without considering either the number of shares held or the net asset value applicable to one share.

Financial sector

At the beginning of October 2008, the three Luxembourg subsidiaries of Icelandic banks suffered under the financial difficulties of their parent companies, and had to cease making payment to creditors as a result of their own parent companies stopping payments.³⁴

The regime and modalities of the suspension of payment as defined in the LSF has been extensively interpreted by the case law.

First, and concerning the duration of the suspension of payments, despite the fact that Article 60-2 (10) of the LSF is very clear (‘the judgment shall lay down, for a period not exceeding six months, the conditions and detailed arrangements governing the suspension of payments’), it appears that a six-month period to find a solution to reorganise a bank could be too short. Therefore the Tribunal d’Arrondissement has extended this period, basing its reasoning on the parliamentary comments included in the draft bill of Law No. 2,548 p12 Article 7 (Law of 10 August 1982, reproduced itself in the Law dated 19 March 2004), which modifies the LSF with regards to the suspension of payments.

Secondly, the Court of Appeal³⁵ has indicated that:

- a* the suspension of payment regime applicable to the financial sector cannot be compared to the reprieve of payment in the commercial sector, but more or less to controlled management; and
- b* the principle of equal treatment of the creditors is not absolute, especially where there are different categories of creditors, such as clients or private investors, suppliers and intercreditor lending banks, and a restructuring plan is only requested for the latest category, i.e., private investors and suppliers will be fully indemnified, therefore neither public order nor creditors’ interests are damaged, and a restructuring plan can be voted on through the double majority of intercreditor lending banks (number and value of their claim), and thereafter ratified by the court.

32 Tribunal d’Arrondissement VI No. 934/2008, 10 July 2008.

33 ALJB – Bulletin Droit et Banque No. 43 ‘Enseignements jurisprudentiels récents en matière de sursis de paiement dans le secteur financier’ by Marc Elvinger, Elvinger, Hoss & Prussen.

34 Tribunal d’Arrondissement II No. 1,182/08 *Glitnir Luxembourg SA*, Tribunal d’Arrondissement II No. 1181/08, 8 October 2008, *Landsbanki Luxembourg SA*, Tribunal d’Arrondissement II No. 1183/08, 8 October 2008, *Kaupthing Luxembourg SA*, 8 October 2008.

35 Cour d’Appel du Grand-Duché de Luxembourg 28 January 2009 No. 34,351 du rôle.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

Besides the restructuring of the three Icelandic banks, Kaupthing Luxembourg (ratification of the restructuring plan), Landsbanki (judicial liquidation), and Glitnir (suspension of payments, ratification of the restructuring plan, and now voluntary liquidation), Luxembourg's investment fund industry has been affected by the decrease in confidence concerning interbank markets, sparked by the Lehman Brothers bankruptcy and aggravated by the Madoff-related cases.³⁶

V INTERNATIONAL

Luxembourg commercial companies are subject to EC Regulation 1346/2000 on Insolvency Proceedings, which sets forth harmonised rules on conflict of laws and jurisdiction, as well as the recognition and enforcement of insolvency proceedings applying to EU Member States.

Under Regulation 1346/2000, the concept of the Centre of Main Interest ('the COMI') is the keystone for determining the competent jurisdiction for initiation of the main insolvency proceedings.

It appears from Luxembourg case law related to the interpretation of the concept of COMI that it is in line with the European Court of Justice's decisions.³⁷ Case law has been consistent in demonstrating that the Luxembourg courts rebut the presumption in favour of the registered office, if it appears that the subsidiary is a letter box company, which was confirmed in a recent decision of the Court of Appeal.³⁸ Indeed, although the holding companies may be located in Luxembourg, the group's principle interests are abroad and effective managers are not based in Luxembourg.

Another decision made in Luxembourg during 2008 concerned the notion of COMI. In the *PIN* case, a German court in Cologne stated that the COMI can be successfully moved to another Member State. In this case, a Luxembourg holding company relocated its COMI from Luxembourg to Germany just before filing for bankruptcy. The German court considered itself as competent because the functions left in Luxembourg were only of a subsidiary nature. The decision states that the

36 As developed *supra* under Section III ii, which is the text taken from a presentation made by Martine Gerber-Lemaire during the 2nd International Insolvency Convention held in Brussels on 15-17 May 2009.

37 See Steve Jacoby, 'Le siège au regard des procédures d'insolvabilité', *Journal des Tribunaux Luxembourgeois*, No. 1, 5 February 2009, Donata Grasso et Bénédicte Kurth, 'Les difficultés d'interprétation du Règlement (CE) No. 1346/2000 relatif aux procédures d'insolvabilité: champs d'application et compétence internationale', *ACE*, No. 6, June 2009.

38 See decision of the Tribunal d'Arrondissement de Luxembourg, IIème chambre, 7 April 2006, BIJ, 2006, p130 in which the court considered the COMI was in France (all the employees and materials were based in France) and, therefore, refused to open the insolvency proceedings in Luxembourg even if the registered office was located in Luxembourg. See also Court of Appeal, 12 November 2008, No. 32,256, *Journal des Tribunaux Luxembourgeois*, No. 1, p34.

migration of the COMI is only acceptable if the sole objective was not to commit fraud regarding creditors' rights. The court referred to the freedom of establishment as a justification in rendering their decision. The Luxembourg Court,³⁹ which was apprised of the case by a Luxembourg creditor of the Luxembourg entity, has adopted an open-minded approach to recognise the prior migration of the COMI, and decided to open secondary proceedings in Luxembourg. Thus, this case appears to introduce some degree of flexibility, beneficial for multinational groups under EU insolvency law, by allowing a kind of forum shopping under specified conditions.

Finally, it emerges also from the case law that Luxembourg courts recognise a main insolvency proceeding opened in another Member State, without objection, as well as permitting the opening of secondary proceedings.

Note that no official cross-border insolvency protocol has been entered into by Luxembourg and other states. In addition, Luxembourg has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency aiming at, among other goals, cross-border cooperation.

VI FUTURE DEVELOPMENTS

No developments are likely to take place in the forthcoming months. There are currently three pending bills.

One of these bills (Bill No. 6,021) concerns excessive debt and aims for the introduction of a system of civil bankruptcy for private individuals to enable them to make a fresh start without a debt burden and to reintegrate them into the economic system.

The second bill (Bill No. 5,157) aims to adopt some amendments to the law regarding commercial companies to prevent bankruptcies. These measures are mainly to increase the minimum share capital required, to require a report of an auditor for any contribution in kind, and to require the presentation of a financial plan for each business licence demand.

However, for the time being, these two projects are at a stand-still and we do not expect them to be voted on in the immediate future.

Finally, a bill (Bill No. 6,015) relating to payment services that aims to transpose Directive 2007/64/CE into Luxembourg law was introduced in March 2009. This bill defines the notion of payment institutions (which differs from the current notion of credit institutions) and implies that payment institutions might be submitted to reorganisation and bankruptcy proceedings applicable to commercial companies. However, this is still a first draft and it is likely that comments will be published.

39 Tribunal d'Arrondissement Luxembourg, 21 March 2008, No. 447/08.

MARTINE GERBER-LEMAIRE

Oostvogels Pfister Feyten

Martine is a partner within Oostvogels Pfister Feyten and has headed the restructuring and insolvency practice since she joined the firm in 2002.

With over 10 years' professional experience, Martine has expertise with regards to exits, including voluntary liquidations and restructuring, and matters relating to European insolvency law. She is also involved with corporate law, mergers and acquisitions as well as structuring transactions for private equity funds.

Prior to joining the firm, Martine worked with Deloitte & Touche where she was a partner within the legal department. Here, she was responsible for liquidations of various entities including banks, insurance companies, wealth management and trading companies.

Martine is a regular speaker and panellist at many domestic and international events, and contributes regularly to various legal publications.

Martine also heads up the firm's real estate practice and is recognised by Chambers Europe as a leader in its field. She is also a member of the firm's audit committee and management board.

Martine has been a member of the Luxembourg Bar since 2004 and is also a member of other representative bodies including INSOL, IWIRC, IBA and the ILA. She graduated from the University of Nancy (France) and speaks English, French, German and Luxembourgish.

OOSTVOGELS PFISTER FEYTEN

291 route d'Arlon
BP603 / L-2016
Luxembourg
Tel: +352 46 83 83
Fax: +352 46 84 84
info@oostvogels.com
www.oostvogels.com