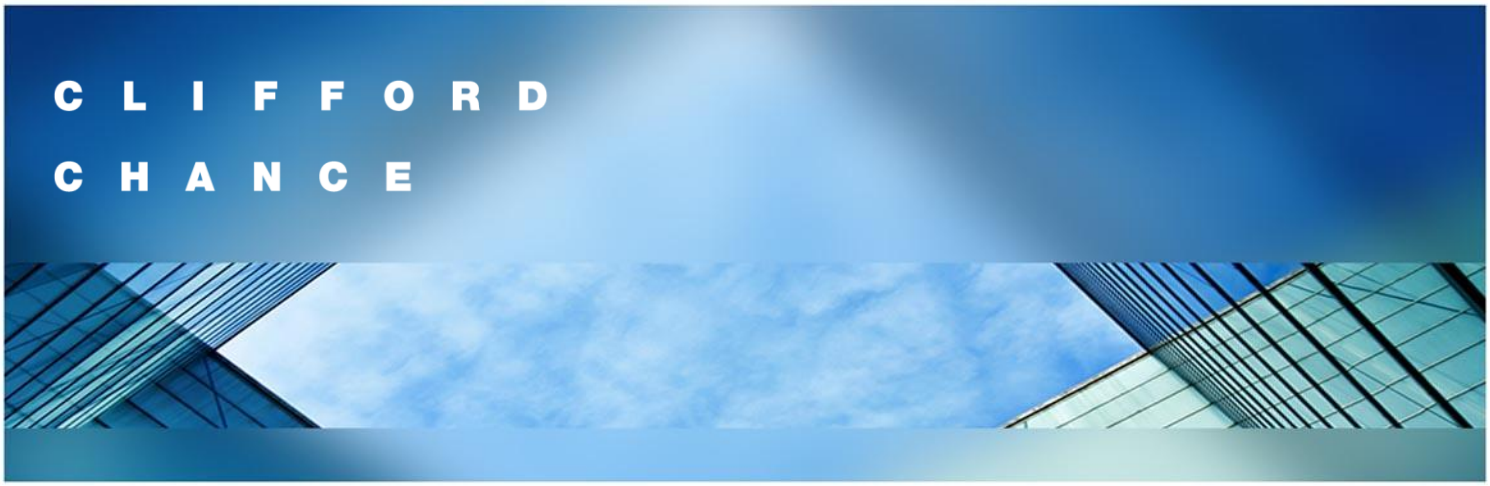

RESTRUCTURING TRENDS IN LUXEMBOURG: THE NEW BUSINESS PRESERVATION LAW

The Luxembourg law dated 7 August 2023 on business preservation and modernisation of the bankruptcy regime (the "**Business Preservation Law**") introduces new reorganisation measures (in and out of court) for distressed businesses to provide for greater flexibility and avoid having recourse to bankruptcy proceedings.

Key issues

- The Business Preservation Law aims at preventing bankruptcies through the introduction of various reorganisation measures, in and out of court, thereby providing for greater flexibility.
- A judicial reorganisation procedure is available to debtors as soon as the business is endangered at the short or longer term.
- A suspension of payments will be granted upon the opening of the judicial reorganisation procedure.
- A reorganisation plan can be adopted by a majority of creditors.

CONTEXT AND OBJECTIVE

The Business Preservation Law entered into force on 1 November 2023 and we see already the first practical applications being made in front of the courts. The new law implements the European restructuring directive (EU) 2019/1023 of 20 June 2019 whose objective is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms. It aims at preventing bankruptcies through the introduction of various reorganisation measures intended to preserve the business. The Business Preservation Law also modernises the bankruptcy law and repeals the composition with creditors and controlled management proceedings which were hardly used in practice.

SCOPE

The Business Preservation Law applies to:

- natural persons qualifying as traders within the meaning of the Luxembourg Commercial Code;
- commercial companies as set out in article 100-2 §1 of the Luxembourg law dated 10 August 1915 on commercial companies, as amended (the "**Law on Commercial Companies**");
- special limited partnerships (*société en commandite spéciale*) as set out in article 100-2 §4 of the Law on Commercial Companies;
- craftsmen (*artisans*); and
- civil companies (*sociétés civiles*).

Credit institutions, insurance companies as well as UCITs, SIFs, SICARs and RAIFs are, amongst others, excluded from its scope.

SUMMARY OF THE NEW MEASURES

1. Out-of-court measures

a. Detection of enterprises in difficulties

The Minister of the Economy and the Minister for Small and Medium-sized Businesses are responsible, within their respective areas of responsibility, to detect debtors in financial difficulty when such difficulties are likely to jeopardise the continuity of the business of such debtor.

Various indicators will be used to determine whether a company is experiencing financial difficulties (outstanding tax and social security liabilities, court judgments, etc.) If the Minister of the Economy and the Minister for Small and Medium-sized Businesses deems that the difficulties of the debtor are likely to jeopardise the continuity of the business of such debtor, the Minister can invite the debtor to gather more information and to inform it on possible reorganisation measures.

An Evaluation Committee for Businesses in Difficulty (*Cellule d'évaluation des entreprises en difficulté*) will also be created which will assess whether a bankruptcy filing is appropriate.

b. Conservatory measures

- Appointment of a **business conciliator** (*conciliateur d'entreprise*)

  A company which finds itself in financial difficulties may ask the Minister of the Economy or the Minister for Small and Medium-sized Businesses that a business conciliator be appointed by such minister which will be chosen from a list of experts in the field, to facilitate the reorganisation of all or part of the assets of the company or its activities.

- **Court appointed expert** (*mandataire de justice*)

  In case of gross and qualified failures *(manquements graves et caractérisées)* of the debtor or one of its bodies which threaten the continuity of the business and if the requested measure is intended to preserve such continuity, a court appointed expert may be appointed by the court.

c. Reorganisation by amicable agreement (*réorganisation par accord amiable*)

The debtor may propose an amicable agreement to all or at least two of its creditors, with a view of the reorganisation of all or part of its assets or activities. Once an amicable agreement has been reached, the court homologates the agreement after having verified that the purpose of the agreement is indeed to reorganise all or part of the debtor's assets or activities. The homologation will render the amicable agreement enforceable. The agreement may only be disclosed to third parties with the express consent of the debtor.

2. Judicial reorganisation (*réorganisation judiciaire*)

The aim of the judicial reorganisation procedure is to preserve, under the control of a judge, the continuity of all or part of the assets or of the activities of the business.

The opening of the judicial reorganisation is aimed at:

- obtaining a suspension (*sursis*) in view of allowing the conclusion of an amicable agreement (*conclusion d'un accord amiable*), and/or
- obtaining the agreement of the creditors on a reorganisation plan, and/or
- allowing a transfer by court order to one or several third parties, of all or part of the assets or the activities.

The application for a judicial reorganisation procedure may pursue a separate objective for each activity or any part of the business.

a. Opening of a judicial reorganisation

A judicial reorganisation procedure is opened as soon as (i) the business is endangered (*dès mise en peril de l'entreprise*), at short term or longer term and (ii) a writ requesting the opening of such procedure has been filed.

If the conditions are fulfilled, the court will declare the opening of the judicial reorganisation and order a stay on payments which cannot exceed 4 months (subject to certain exceptions).

The state of bankruptcy of the debtor does not prevent the opening or the pursuit of the judicial reorganisation procedure.

A court appointed expert (*mandataire de justice*) can be appointed to assist at the request of the debtor or any third party having an interest in doing so.

In case of gross and qualified failure of the debtor or one of its bodies, the court may also appoint a temporary administrator (*administrateur provisoire*) at the request of any interested party or the public prosecutor.

b. Effects of the decision to open judicial reorganisation procedures– general rules

- During the duration of the stay, creditors can no longer enforce their rights against the debtor in relation to the "stayed" claims (*créances sursitaires*) (which are all claims other than claims for the payment of salaries) and no attachment may be made. Enforcement of financial collateral arrangements coming within the scope of the law of 5 August 2005 on financial collateral arrangements continues to be possible.
- During the stay, voluntary payments of "stayed" claims are not prohibited if such payment is necessary to ensure the continuity of the business.
- Notwithstanding any contractual provisions to the contrary, on-going agreements are not terminated by the request or the opening of the judicial reorganisation procedure nor the modalities of their execution/performance.
- During the stay, the debtor may not be declared bankrupt (unless he would make the filing himself) and in case of a company, it may not be subject to judicial dissolution nor an administrative dissolution without liquidation.
- Penalty clauses and increased interest rate clauses are without effect during the period of the stay and until integral execution of the reorganisation plan in relation to those creditors which figure in the plan.

c. Effects of the decision to open judicial reorganisation procedures– specific rules

- **Conclusion of an amicable agreement**

  In case the objective of the judicial reorganisation procedure is the conclusion of an amicable agreement (*conclusion d'un accord amiable*) with all or at least two or more creditors of the debtor, the debtor will pursue such objective, if necessary, with the help of a court appointed expert (*mandataire de justice*). If a business conciliator was previously appointed, the court can decide to terminate part or all of the mission of the business conciliator (*conciliateur d'entreprise*).

- **Collective agreement**

  The debtor must inform the "stayed" creditors (*créanciers sursitaires*) within 14 days of the judgment opening the judicial reorganisation procedure, of the amount and nature of their debts, as well as the class to which they belong, i.e. an ordinary "stayed" creditor or an extraordinary "stayed" creditor.

  During the period of the stay, the debtor will have to draw up a reorganisation plan which will then be presented to its creditors and which has to contain a descriptive part and a prescriptive part. The court appointed expert (*mandataire de justice*) (if one has been appointed) may assist the debtor in the preparation of the plan.

  The reorganisation plan is considered approved by the creditors when the ballot receives in each class the favorable vote of the majority of the creditors, representing by their uncontested or provisionally admitted claims, half of all amounts due in principal.

  Cross-class cramdown: If the plan has not been approved by the affected parties in accordance with the majorities requested in each class authorised to vote, it may nevertheless be homologated upon proposal by the debtor, or with the agreement of the debtor, and be imposed on the dissident classes authorised to vote, if it has been approved by one of the classes of creditors authorised to vote and if the restructuring plan meets additional conditions (best interest test of creditors, the extraordinary stayed creditors are treated in a more favorable manner than the ordinary stayed creditors, no class of affected parties may receive or retain more than the total amount of its claims or interest).

  The homologation of the reorganisation plan makes it binding on all stayed creditors.

- **Transfer by court order to one or several third parties, of all of part of the assets or activities**

  The transfer by court order can be initiated either by the debtor itself, at the request of the public prosecutor, a creditor or at the request of any interested party (under certain conditions).

  The judgment which provides for a transfer by court order will also appoint a court appointed expert (*mandataire de justice*) whose role it will be to organise the transfer of all or some of the company's assets in order to ensure the continuity of the business.

MODERNISATION OF THE BANKRUPTCY REGIME

The Business Preservation Law also amends certain provisions related to the bankruptcy regime contained in the Commercial Code. The most important changes are as follows:

- Fraudulent bankruptcy (*banqueroute frauduleuse*) has been decriminalised and is now an offense (*délit*) as opposed to a crime (*crime*) to ensure that pursuits may be engaged more rapidly and efficiently.
- The obligation to file for bankruptcy is suspended as soon as a request requesting the opening of a judicial reorganisation has been filed and during the duration of the stay of payments.
- The public prosecutor is now also entitled to request the opening of bankruptcy proceedings. Previously bankruptcy proceedings could only be opened at the request of the debtor, upon application by a creditor or ex officio by the court itself.

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