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The International Comparative Legal Guide to:

Lending & Secured Finance 2015

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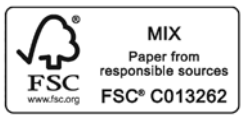

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Country Question and Answer Chapters:

Luxembourg

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in Luxembourg?

Luxembourg's importance as an international financial and banking centre is well known. In relation to its activities in financing, debt financing structuring is the most relevant. Financing through public offers and listings of bonds has increased.

Since the financial crisis, debt restructuring has also significantly increased.

It is common market standard that lenders (either banks or private lenders) secure their lending through collateral arrangements under the law of 5 August 2005 on financial collateral arrangements, as amended (the "**Collateral Law**") or by taking similar security interests.

1.2 What are some significant lending transactions that have taken place in Luxembourg in recent years?

As elsewhere in Europe, there is a general trend in Luxembourg towards preferring personal lending to bank loans.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A company can guarantee borrowings of one or more members of its corporate group (see questions 2.2, 2.3 and 2.5).

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

There is no enforceability issue, but another concern could be the director's civil liability for mismanagement or his criminal liability for abuse of corporate assets.

2.3 Is lack of corporate power an issue?

The lack of corporate power might be an issue. This will depend on whether the company is a limited or an unlimited liability company.

In the framework of an unlimited liability company, and given the unlimited liability of the shareholders, the company is not bound by an agreement entered into by the manager/director that is not included in the corporate object. Based on the theory of the mandate, the manager/director has no power to enter into such an agreement in the name of the company. Therefore, he is bound to the agreement, not the company. However, the shareholders may ratify the agreement *ex-post*. In that case, the company is bound.

In the framework of a limited liability company, the company is bound by the agreement even if it falls outside the corporate object. Nevertheless, the company is not bound by such an agreement if it can prove that the third party knew or should have known that the agreement fell outside the corporate object, the publication of the articles of incorporation not being sufficient proof of knowledge of such fact.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Neither governmental nor other consents, filings or formalities are required as such, although for corporate governance purposes resolutions granting the guarantee should be taken by the management, but shareholder resolutions are only necessary if the articles of association so specify.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

In order to avoid the risk of bankruptcy, it is generally market practice that guarantees provided by a Luxembourg guarantor are limited to a certain amount (90-95%) of their net assets (*fonds propres nets*).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

Exchange control and similar obstacles to the enforcement of a guarantee do not exist under Luxembourg law.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Security can be granted over immovable or movable properties. The types of security over immovables are mortgage and antichresis; securities over movables are pledge (the most common), transfer of title for security purposes (including fiduciary transfer), repurchase agreements and netting agreements.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Under the Collateral Law, the parties to a pledge agreement may agree that all collateral presently or in the future owned by the collateral provider are or will be subject to the pledge without the need to specifically designate it. However, the perfection of the pledge must follow the rules set out for each type of collateral and therefore it is more common to give security by a separate agreement in relation to each type of collateral.

See also question 3.7 in respect of pledge over a business.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral security over real property is granted by way of a mortgage, which must be executed through a notarial deed and registered in the Luxembourg mortgage register (*Bureau de Conservation des Hypothèques*) and, less commonly, by way of antichresis.

As for machinery/equipment, such assets can be collateralised by way of a pledge governed by the Luxembourg Civil Code and executed by a public or private deed; however, this rarely happens in practice as these assets cannot be easily delivered to the creditor.

See question 3.7 in respect of pledge over a business.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes, under the Collateral Law a pledge over receivables (pledge or transfer of title for security purposes) can be established. The mere conclusion of the pledge contract is sufficient to perfect a pledge over claims. However, the debtor can discharge his obligations as long as he has no knowledge of such conclusion. Hence, in practice, it is better to notify the pledge to the debtor.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes. See question 3.4 as for the perfection requirements, given that cash deposits are treated as claims of the account holder *vis-à-vis* the bank. Furthermore, as banks usually obtain a first ranking security from the account holder, it is common practice to have such security waived by the bank in respect of the pledged bank account.

3.6 Can collateral security be taken over shares in companies incorporated in Luxembourg? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, under the Collateral Law, shares can be pledged or transferred for security purpose.

Shares can be issued in dematerialised, registered or in bearer form.

The perfection of the pledge over dematerialised shares requires a registration in the relevant account – as they are "book entry" securities. For registered shares, a registration in the shares register is required. This now also applies to bearer shares, as the Law of 28 July 2014 introduced an obligation to deposit the bearer shares with a Luxembourg established professional depository and to maintain a bearer shares register at the depository's office. Any transfer/pledge over the shares must be registered in such register.

It is not forbidden, in principle, to submit a pledge agreement to a foreign law (including US and UK ones). In practice, the law of the place where the financial collateral is located applies. The possibility of submitting a pledge/other financial collateral arrangement to a foreign law seems to be excluded *inter alia* for bearer shares, as the depository must be located in Luxembourg.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

In general terms, the collateralisation of inventory faces the same "delivery" problems stated in question 3.3 as to machinery/equipment.

It is possible to grant a pledge over a business, subject to certain conditions (see Grand-Ducal Decree of 27 May 1937, as amended): among others, such pledge can be granted only to certain authorised credit institutions and breweries, by way of a written agreement which must be registered with the mortgage register, and may cover only 50% of the value of the stock of the collateral provider.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, provided that it is allowed by its corporate object and its corporate interest.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

It depends on the type of security.

Instruments evidencing a financial collateral arrangement under the Collateral Law are not subject to registration formalities, but if they are registered, a fixed rate of EUR 12 applies.

A mortgage requires the payment of a registration duty (*droit d'enregistrement*) of 0.24% and an inscription duty (*droit d'inscription*) of 0.05% of the secured debt. In addition, variable notarial fees apply.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The filing, notification or registration (where necessary) does not involve a significant amount of time. See question 3.9 for the relevant expenses.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Not in general terms.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Not in general terms. Notarisation can be required under certain conditions (e.g. mortgage).

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

A public limited company (*société anonyme*) may not, directly or indirectly, advance funds or make loans or grant security with a view to the acquisition of its own shares by a third party, except under the conditions set out by Art. 49-6 of the law of 10 August 1915 on commercial companies, as amended.

(b) Shares of any company which directly or indirectly owns shares in the company

No.

(c) Shares in a sister subsidiary

No.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will Luxembourg recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

In general, the concept of agency (*mandat*) is known and recognised under the Luxembourg Civil Code. An agent may act in the name and on behalf of its principal pursuant to a contractual agency agreement. In addition, a trustee should be recognised pursuant to the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition, ratified by the Luxembourg law of 27 July 2003 on trusts and fiduciary contracts.

For financial collaterals, the Collateral Law expressly provides that financial collateral can be granted in favour of a person acting on the account of beneficiaries (lenders) of the collateral, a fiduciary or a trustee, who benefits from the same rights as the beneficiaries.

5.2 If an agent or trustee is not recognised in Luxembourg, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See question 5.1. In addition, a mechanism such as "parallel debt" or plurality of creditors (*solidarité active*) could be used for other security interests.

5.3 Assume a loan is made to a company organised under the laws of Luxembourg and guaranteed by a guarantor organised under the laws of Luxembourg. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

To make a transfer of receivables enforceable towards third parties, Luxembourg law requires a notification to the debtor or an acceptance by the debtor of the transfer (Articles 1690 of the Civil Code). Such notification or acceptance may be made in a private deed or a public deed.

The transfer of receivables includes the accessories of the receivables such as personal guarantee, privilege and mortgage (Article 1692 of the Luxembourg Civil Code). Any independent guarantee (guarantee on first demand) is not considered an accessory and will not be automatically transferred.

If the transfer of the loan results in the assignment of the contract, Luxembourg law does not require the consent of the borrower unless it is provided otherwise or the contact has an *intuitu personae* character.

6 Withholding, Stamp and other Taxes; Notarial and other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

In principle, there is no withholding tax on interest payment when paid to domestic or foreign lenders which are corporate entities.

There is no withholding tax on the proceeds of a claim further to the enforcement of a security interest.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

No tax or other incentive is provided to foreign lenders.

With respect to loans, mortgages or other securities, the registration of any document with the *Administration de l'Enregistrement et des Domaines* in Luxembourg may be required in the case of legal proceedings before Luxembourg courts (if competent) or, in the case that such document must be produced before an official Luxembourg authority, in which case either a nominal registration duty or an *ad valorem* duty will be payable depending on the nature of the document to be registered.

A registration fee may also be due if (i) the security document under private deed is voluntarily registered with the registration tax authority, or (ii) the security document is in the form of a notarial deed (e.g. mortgage, antichresis, pledge over certain specific assets). See further in question 3.9.

6.3 Will any income of a foreign lender become taxable in Luxembourg solely because of a loan to or guarantee and/or grant of security from a company in Luxembourg?

No.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

For any security interests which require a notarial deed, the notary's fees will be calculated on a sliding scale based on the value of the secured property or the secured amount, depending on the type of security interest.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No.

7 Judicial Enforcement

7.1 Will the courts in Luxembourg recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in Luxembourg enforce a contract that has a foreign governing law?

In principle, an international contract governed by a foreign law will be recognised and enforced by the courts in Luxembourg, provided its provisions or its enforcement are compatible with Luxembourg public policy.

Parties to a contract which is purely internal to Luxembourg are also unable to derogate from the legal rules that, under Luxembourg law, cannot be derogated from even by agreement.

Financial collateral on financial instruments transferable by book entry established under the Collateral Law are governed by the law of the country in which the relevant account is maintained, as for the matters listed in Article 23.2 of the Collateral Law.

7.2 Will the courts in Luxembourg recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

For decisions from countries out of the European Union, Luxembourg courts recognise and enforce foreign judgments which are enforceable in the country which gave them, provided they fulfil the conditions for their exequatur, without re-examining the merits of the case. The current principle is that the Luxembourg Court cannot re-examine the merits of the foreign decision if it is regular on a formal basis (decision regularly obtained against the other party).

For decisions from EU Member States, however, a simplified process applies. Generally, all civil and commercial judgments given in an EU Member State (therefore including UK judgments), resulting from proceedings initiated after 10 January 2015 and which are enforceable in that Member State are directly enforceable in Luxembourg without any exequatur proceedings (Regulation (EU) N°1215/2012 of 12 December 2012, "Recast Brussels I Regulation"). Decisions obtained before 10 January 2015 are still submitted to the Council Regulation (EC) No 44/2001 of 22 December 2000 and thus to the exequatur proceeding but without any re-examination of the merits of the case.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in Luxembourg, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in Luxembourg against the assets of the company?

a) Obtaining a first instance decision is likely to take approximately one year without recognition by the debtor. Its enforcement can be immediate if the judge expressly orders it to be. If not, the judgment would be enforceable once it has become unchallengeable (either by exhaustion of judicial remedies or, if no appeal is lodged, generally forty days after the judgment is notified). If the debtor grants a default, the decision could be obtained within three months and enforceable after the expiry of the opposition and the time allowed for appeal (40+15 days not including any further time allowance resulting from the foreign domicile of the debtor).

b) Except where no exequatur is needed (see question 7.2), judgments given by a jurisdiction located in a country bound to Luxembourg by an international convention on the mutual recognition and enforcement of judgments (including EU Members) must go through the "simplified" exequatur proceedings. The exequatur order is sought ex parte, granted within approximately one week, and immediately allows the claimant to take provisional measures (enforcement measures can only be taken once the order can no longer be challenged).

The exequatur of other foreign judgments (including US judgments) can only be sought via common proceedings. At first instance, a decision will be reached within approximately one year and can be enforced under the conditions described in question 7.3 a).

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or (b) regulatory consents?

(a) Luxembourg law distinguishes civil, commercial and financial collateral securities.

Whereas the realisation of a civil collateral arrangement requires a judicial decision, the creditor of a commercial arrangement may either request appropriation of the collateral to a court or auction it after a prior formal notice.

For both, the collateral can only be liquidated at a price set by an expert or by auction.

On the other hand, financial collateral arrangements subject to the Collateral Law can be immediately realised without judicial intervention or prior formal notice and the creditor may appropriate, auction or more generally dispose of the collateral upon default.

(b) Under certain conditions, where shares of an entity under supervision of an authority are pledged or where the beneficiary of the pledge over shares is an entity supervised by an authority, some activities e.g. notifications to the competent supervisory authority may be required.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in Luxembourg or (b) foreclosure on collateral security?

a) Foreign claimants (except for claimants residing within an EU Member State, a Member State of the Council of Europe or a State that is bound with Luxembourg by an international convention excluding such security), including US claimants, may be requested by the judge to give security in order to cover the legal costs and the damages which it might be ordered to pay.

Also, foreign claimants will have to elect residence in Luxembourg (in practice, the residence of the Luxembourg counsel is chosen and is anyway compulsory for written procedures).

b) No specific restrictions apply to foreign lenders in the event of foreclosure on collateral security.

7.6 Do the bankruptcy, reorganisation or similar laws in Luxembourg provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

From the opening of the bankruptcy proceedings, ordinary creditors and creditors which hold a general preferential right cannot launch or continue any enforcement proceedings against the debtor whereas creditors holding a special preferential rights are barred only until the end of the verification of claims.

Also, this moratorium does not apply to financial collateral arrangements governed by the Collateral Law.

As to other insolvency proceedings, controlled management ("*gestion controlée*") results in a moratorium against enforcement proceedings applicable to all creditors whereas, in the case of a stay on payment ("*sursis de paiement*") or preventive composition ("*concordat préventif de faillite*"), it only applies to ordinary creditors.

7.7 Will the courts in Luxembourg recognise and enforce an arbitral award given against the company without re-examination of the merits?

The Luxembourg courts will recognise and enforce an arbitral award without re-examination of the merits. Pursuant to Article 5 of the New York Convention 1958 and Article 1251 of the New Civil Procedure Code, the exequatur of foreign arbitral awards can only be refused on limited formal grounds as listed.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

See question 7.6.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

a) Clawback rights

Agreements concluded during the hardening period ("*période suspecte*" – defined as the period during which the bankrupt was in a state of cessation of payments and which, as a principle, cannot exceed six months before the bankruptcy judgment) and the ten days preceding the hardening period, are void or can be annulled by the court on the request of the bankruptcy trustee.

However, these clawback provisions do not apply to financial collateral arrangements governed by the Collateral Law.

b) Preferential creditors

Certain creditors' claims take priority in terms of payment, including creditors of the bankrupt estate ("*créanciers de la masse*"), super-preferential employee claims for debts which relate to the last six months of work *or* preferential rights of the Public Treasury and welfare agencies.

Financial collateral arrangements governed under the Collateral Law are not affected by bankruptcy proceedings.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Entities whose activities are subject to supervision by the *Commission de Surveillance du Sector Financier* as is the case for professionals of the financial sectors, including notably credit institutions or common funds, or whose activities are subject to the supervision of the *Commissariat aux Assurances*, i.e. insurance companies, are subject to liquidation proceedings as defined under the relevant applicable laws (e.g. law of 5 April 1993 on the financial sector, as amended; law of 6 December 1991 on the insurance sector, as amended).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Financial instruments and claims subject to a pledge governed by the Collateral Law can be seized out of any court proceedings.

Also, the enforcement of a claim can in principle be operated by mandatory set-off ("*compensation légale*") if the conditions to it are fulfilled prior to a bankruptcy judgment of either party.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of Luxembourg?

A party's submission to a foreign jurisdiction in civil and commercial matters is generally legally binding and enforceable under the laws of Luxembourg, provided that it is, *inter alia*, not manifestly incompatible with Luxembourg public order provisions (*ordre public*).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of Luxembourg?

A sovereign entity's waiver of jurisdiction immunity is generally binding and enforceable under the laws of Luxembourg. According to the current jurisprudence, such a waiver must be certain and unequivocal.

10 Other Matters

10.1 Are there any eligibility requirements in Luxembourg for lenders to a company, e.g. that the lender must be a bank, or for the agent or security agent? Do lenders to a company in Luxembourg need to be licensed or authorised in Luxembourg or in their jurisdiction of incorporation?

Following the law of 5 April 1993 on the financial sector, persons established in Luxembourg whose activity is to grant loans to the public, must either – depending on the precise activity – be a credit institution or a specialised professional of the financial sector.

Lenders from other EU Member States may generally, subject to the rules under the law of 5 April 1993 on the financial sector, exercise their lending activities in Luxembourg under their home country licence, through the establishment of a branch, as well as the provision of services.

Generally, lenders from a third country, carrying on lending activities, not being established in Luxembourg but occasionally and temporarily coming to Luxembourg for exercising these activities, must be authorised by the competent authorities in Luxembourg.

10.2 Are there any other material considerations which should be taken into account by lenders when participating in financings in Luxembourg?

No.

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MOLITOR
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