GRR INSIGHT

Europe, Middle East and Africa Restructuring Review 2020

EUROPE, MIDDLE EAST AND AFRICA

RESTRUCTURING REVIEW 2020

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Preface

Welcome to the *Europe, Middle East and Africa Restructuring Review 2020* – a Global Restructuring Review special report.

Global Restructuring Review is the online home for all those who specialise in cross-border restructuring and insolvency, telling them all they need to know about everything that matters.

Throughout the year, the GRR editorial team delivers daily news, surveys and features; organises the liveliest events ('GRR Live') – covid-19, etc, allowing; and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that delve deeper into developments than the exigencies of journalism allow.

The *Europe, Middle East and Africa Restructuring Review 2020*, which you are reading, is part of that series. It contains insight and thought leadership from 23 pre-eminent practitioners from those regions.

Across 10 chapters and 122 pages, it is part invaluable retrospective and part primer on restructuring practice in different markets, with a little crystal ball gazing thrown in from time to time. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors discuss recent changes and what they mean, supported by footnotes and relevant statistics.

This edition covers England and Wales, France, Ireland, Luxembourg, the Middle East, the Netherlands, Portugal, Spain and Switzerland, and it also has a fascinating overview on aviation, in particular how the United Kingdom's new Corporate Insolvency and Governance Act may circumvent protections in an international treaty.

Among the discoveries for the reader:

- valuation evidence may be much, much more important to schemes in London, going forwards;
- more than 50 per cent of the world's leased aircraft are leased from Ireland; and

- Campari-Milano, Fiat Crysler, and Cementir are all now 'Dutch' companies, having relocated their legal domiciles recently.

There's also a cracking table breaking down the key aspects of restructuring and insolvency regimes in three gulf states: Bahrain, Saudi Arabia and the United Arab Emirates.

We are indebted to our wonderful contributors, including our editor and GRR editorial board member Céline Domenget Morin, for their efforts. If you have any suggestions for future editions or want to take part – the review is put out annually – my colleagues and I would love to hear from you.

Please write to insight@globalrestructuringreview.com.

David Samuels
Publisher
November 2020

Corporate Reorganisations and Restructuring in Luxembourg

Basile Fémelat and Nicolas Marchand
AKD Luxembourg

In summary

This chapter provides a practical, short reference tool for any company contemplating, or in the process of executing, a solvent or insolvent Luxembourg reorganisation.

Discussion points

- Impact of the covid-19 pandemic on reorganisations
- Legal environment and typical attention points for solvent reorganisations
- Description of the insolvency procedures available in the context of restructuring
- Overview of debt or capital restructuring

Referenced in this article

- Commercial Code
- Draft Bill No. 6539 on business preservation and modernisation of bankruptcy law
- Law on financial collateral arrangements, dated 5 August 2005

Business uncertainty will continue into the near future given the impact of the covid-19 pandemic. In the current environment, certain businesses may consider, willingly or forcefully, restructuring their activities. Companies have been assessing the scale and magnitude of the pandemic on their short-term objectives while keeping an eye on their long-term performance. As the impact of the pandemic on businesses becomes clearer, timely measures will need to be identified and implemented. This means identifying and acting on opportunities for strategic, operational, organisational and financial change.

Within that framework, it is clear that corporate reorganisations and restructurings will grow. While we may still be at the tip of the iceberg in terms of implementing those restructurings, there are certain preliminary and legal issues that businesses can consider in the context of any proposed corporate reorganisation and restructuring under Luxembourg law. Careful planning and implementation are key to the success of those operations.

The first part of this article aims to address corporate reorganisation. The second part will be dedicated to insolvent restructurings. This article aims to provide a practical, short reference tool for any company contemplating, or in the process of executing, a Luxembourg reorganisation.

Corporate reorganisation

In Luxembourg, as is the case elsewhere, the term 'corporate reorganisation' is applied to a wide variety of transactions that globally relate to the reorganisation of a group of companies. Most often, a corporate reorganisation implies various corporate steps, such as mergers and demergers, share and asset disposals, conversions of corporate form and company migrations.

Turning to the rationale, reorganisations are generally driven by several factors, such as the integration of acquired assets or businesses, the streamlining of existing business operations, optimisation of business activities or a change in the capital structure. It is also common for a reorganisation to be driven by multiple factors, including tax aspects and debt restructuring.

Impact of the covid-19 pandemic

Corporate reorganisations are mostly internal driven processes (ie, being mostly internal to a group of companies) and can occur at any stage of an organisation's life cycle. Accordingly, there is usually a relatively constant demand for this type of work.

In the aftermath of the first wave of the covid-19 pandemic in Europe (ie, between March and June 2020), there was a halt in this type of work; however, since July 2020, there has been an increased appetite for reorganisations, although activity is still below pre-pandemic levels. With the pandemic continuing, more restructurings and reorganisations are expected to be implemented as companies drain their liquidities.

In that particular context, businesses must be proactive in assessing their exposure from both an operational and a financial perspective. Business leaders must act decisively to mitigate risks and plan for rapid and slow recovery scenarios and associated impacts on liquidity. Any reorganisation raises issues of business strategy, process management and technical

expertise. Once a theoretical integration plan has been developed, practical implementation issues will prove to be critical in determining how quickly the plan can be implemented and how soon the benefits of the integration can be realised.

Luxembourg legal environment

Luxembourg is widely considered to be a favourable environment for holding companies as it offers a supportive investment environment, an extensive network of tax treaties, a wide array of fund structuring options and a flexible corporate toolbox. Further, the implementation of partnership structures (under which typical US and UK partnership structures can be replicated) has aided in the recognition and use of Luxembourg in closed-ended private fund structures.

To complete that framework, in 2016, a major reform and modernisation of company law was implemented to revamp the corporate law to adapt it to current business needs and to introduce added flexibility to the most used forms of companies. The two underlying principles to this reform were enhancement of contractual freedom and the promotion of a business-friendly environment.

The reform adapted the legal framework to economic realities and improved the consistency of Luxembourg corporate law and Luxembourg's competitiveness. In particular, Luxembourg corporate law offers a complete toolbox in respect of reorganisation, allowing companies to:

- migrate in and out of Luxembourg without losing their legal personality (provided this is also permitted by the country of departure or the receiving country);
- change their corporate form; and
- merge and demerge, fully or partly, both within Luxembourg across borders.

Typical structure of corporate reorganisations

The structuring mainly depends on the underlying reasons for the reorganisation; however, in all cases, it involves a planning and preparation phase, which is followed by implementation. In certain cases, a negotiation phase (eg, with banks, employees or minority shareholders) may also be required. In all instances, planning is a key aspect of ensuring efficient implementation and generally includes:

- commercial and strategic planning;
- setting up of communication lines both with advisers and, internally, with managers and directors of the companies involved;
- performance of due diligence exercises (eg, tax, legal, accounting or finance);
- valuation exercises (eg, transfer pricing analysis);
- identification of any regulatory, commercial or legal issues or barriers (eg, filing with authorities or mandatory terms that may apply to certain corporate actions);
- adjustment of a timeline and preparation of legal steps; and
- setting up of a virtual data room or communication method to provide access to draft and executed versions of the reorganisation materials.

Prior to effecting a reorganisation, its impact should be considered holistically, meaning that the consequences on the commercial, legal, tax, accounting and time aspects should be vetted before any implementation. Several basic principles must be accounted for, including the fact that transactions between group companies should be conducted at arm's-length and that a mandatory waiting period applies in the case of mergers and demergers.

The first stage should generally entail a decision on the business goals, timing and implementation, and it should prioritise accordingly. Once this initial information planning has been carried out, preliminary analysis of the information must be conducted to develop an overall integration plan.

In almost all cases, corporate reorganisations involving Luxembourg entities will also have components involving foreign companies and will, thus, require close coordination between the various counsels at hand. Owing to the international nature of almost all corporate reorganisations in Luxembourg, it is common for a foreign adviser to complete the structuring of the reorganisation, resulting in certain practical issues, such as compliance with the applicable transfer and assignment provisions and the post-completion registration and filings approvals.

Similarly, the need for valuations and the establishment of (interim) accounts, the method of valuation and calculation of distributable amounts is often overlooked, and the time required for them is often underestimated. Those issues could easily be resolved in the early stages of reorganisation by considering the local accounting implications of the contemplated steps. Ideally, these should be vetted in advance with the accounting team and the tax adviser to ensure the accounting treatment is consistent with the objectives of the reorganisations.

Planning and accounting for requisite approvals

The internal corporate consent and approvals will depend mainly on the nature of the reorganisations and the entities concerned. The contractual documentation (eg, shareholders' agreements) may affect the consent and approvals required (eg, when containing specific reserved matters or transfer restrictions clauses).

Generally, board consent should be obtained to authorise the corporate reorganisation. For corporate governance purposes, consent should be approved in advance. For certain actions (eg, share capital increases or decreases, amendments to the articles of association, or mergers and demergers), shareholders' approval may also be required. The quorum and voting requirements will depend on the applicable documentation and type of entities.

External consent and approvals must be carefully accounted for in corporate reorganisations. It is important to evaluate the impact on the proposed reorganisation on each entity. In particular, it should be considered whether any of the participating entities:

- holds specific permits or other operating licences;
- holds or leases any real estate;
- is party to any IT or IP licences from outside the company group;
- is party to any external financing or debt arrangements, or internal financing such as cash pooling;

- is party to third-party contracts that might contain specific change-of-control clauses, negative covenants or securities; or
- has employees.

Particular attention should be paid to regulated entities (eg, entities subject to the supervision of the Commission for the Regulation of the Financial Markets) and entities engaged in regulated markets (eg, energy, telecommunications, healthcare or financial services). In those cases, mandatory consent or notification may be required before any implementation.

Aftermath of a reorganisation

Corporate reorganisations usually require post-completion actions, but their nature depends on the type of transaction. In Luxembourg, most common post-completion actions include:

- registration of share transfers and, where applicable, pledges in share registers;
- filings and registrations of applicable information with the Luxembourg business register;
- filing of notarial deeds with the Luxembourg business register; and
- bookkeeping entries.

Further potential post-completion actions include:

- filings with the land register or other public registers (eg, when transferring immovable property);
- notification requirements for specific regulated businesses (the most common being companies active in the financial services industry in Luxembourg); or
- filing with the competent patents or trademarks office.

Once the integration steps have been completed, the process begins whereby the relevant accounting entries that reflect the various transactions both at the group and local statutory levels are completed, legal books and records are updated, and any post-integration legal filings that are required are made. While not being considered as core, these formalities cannot be overlooked.

Reorganisations may have different rationales, such as improvement of the companies' financial positions, streamlining of their operations, consolidation of their corporate structure to achieve cost savings, attraction of equity investment or intention of refinancing or sale. Before considering implementing any restructuring, it is strongly recommended to obtain specific legal, tax and accountancy advice to determine the option most suitable for achieving particular restructuring goals. The variety of options makes the choice more difficult but may prove efficient in terms of costs, and timing is carefully planned. The best outcomes are achieved when outside counsel and management work closely together to strike a balance that makes the best use of internal resources but leverages the particular experience and expertise of their counsel, ensuring the best use of scarce management time.

Insolvency proceedings in the context of restructuring

Insolvency proceedings are recurring topics in the context of restructuring because the threat of potential bankruptcy imposes changes within the company's management, or negotiations with creditors become a necessity.

Legal provisions governing insolvency proceedings are included in the Commercial Code and are applicable to all commercial companies registered in Luxembourg. The provisions contain two main regimes: one with the objective of liquidating the company and the other with the aim of reorganising it.

Liquidation procedures

Liquidation procedures aim to liquidate the assets of the company and to pay, to the extent possible, its creditors. They will result in the winding up of the company's activities and are often the options most avoided when restructuring solutions are awaited and expected.

- Bankruptcy: bankruptcy applies to a commercial company as soon as two cumulative conditions are meet: cessation of payments (ie, due debts are no longer paid) and loss of creditworthiness (ie, inability to refinance and raise new financing). Once those two conditions are met, the company is in bankruptcy, and its directors or managers should file, within a month, a bankruptcy request with the competent court to avoid potential civil and criminal sanctions. In addition to the company's management, the court or any creditor can also initiate and file a request for the opening of bankruptcy proceedings.
- Judicial liquidation: in specific circumstances, if certain mandatory provisions are not respected (eg, failure to publicise financial accounts), a Luxembourg court could order the liquidation of a company to protect third-party creditors. In this case, a liquidator will be appointed to realise all the company's assets to pay back creditors.

In a restructuring scenario, the various stakeholders should ensure that none of the above situations actually occurs to avoid an involuntary liquidation procedure that would result in the winding up of the company. One of the key elements is to ensure that, at any time, the creditworthiness of the company is secured to remove the risk of bankruptcy, which is, in most cases, an ending scenario.

Reorganisation procedures

Several procedures exist with the aim of finding an agreement with some of or all the creditors and helping the company to restructure its short-term obligations and overall general business.

- Stay of payments: owing to liquidity issues, a suspension of payments to creditors may be requested and filled with the court by a company that shows strong signs of possible financial recovery. To be allowed, this procedure requires the preliminary agreement of the majority of the creditors (together representing three-quarters of the total aggregated debt) and express consent of the court. If agreed, the suspension of payments is effective for a predetermined period, and the company's management body remains in charge of the company's day-to-day business.

- Controlled management: a company in financial difficulty may request assistance from the court in the form of placement under controlled management proceedings. The court assesses whether a reorganisation is feasible and appoints commissioners to submit and execute a reorganisation plan. Once finalised and published, the plan will be enforced by the court only if it has been preliminarily approved by the majority of the creditors (together representing more than half of the total aggregated debt).
- Composition with creditors: this is a protective measure that aims to find an arrangement between a company in financial difficulty and its creditors to avoid bankruptcy. A request should be filed with the court, detailing the reasons for the company's current financial difficulty, a list of its assets and creditors and a proposed, detailed composition scheme. If accepted, the court will appoint a delegated judge to manage the procedure and inform the creditors. The composition scheme will only be finally approved if it has received the agreement of the majority of the creditors (together representing three-quarters of the total aggregated debt). Once approved, it will result in a temporary freeze of all pending enforcement measures. The procedure will be reviewed every three months and will end if the company's situation improves. If it does not improve, a bankruptcy procedure may follow.

Unfortunately, the above reorganisation procedures appear to be outdated and are almost never used in practice; discussions with creditors usually occur too late, when the conditions for bankruptcy have already been met, and reorganisation solutions are no longer viable. In this context, profound changes and the introduction of new voluntary procedures involving creditors are necessary.

Upcoming reforms

A project to reform the rules for insolvency proceedings was presented in 2013 (Draft Bill No. 6539 on business preservation and modernisation of bankruptcy law) and is, at the time of writing, still in discussion. The objective is to reform the current system and provide more possibilities for business reorganisations. Another objective of the reform is to enhance possibilities to negotiate with creditors and protect the weakened company during a certain period, allowing it to recover and restructure.

Although the implementation of the new bankruptcy law has already been awaited for several years, it is expected to be finalised in the near future. It is also expected to implement into the local framework the final pieces of the European regulation relating to procedures concerning restructuring, insolvency and discharge of debt.

Financial restructuring

In addition to corporate reorganisation and the various insolvency proceedings, refinancing and debt or capital restructuring remain suitable options for companies in financial difficulty.

The first option would be to raise new financing to increase the financial capacities of the company. While it is not always the best time nor the best condition to raise 'fresh' new funds when in difficulty, a reorganisation of the existing financing in place among current

creditors could help to relieve some of the pressure. New or extensions of borrowings often include updated or new security interests for the benefit of the creditors, which may also require additional internal preliminary reorganisations.

New financing

New and additional financing may take different forms depending on the needs and the specific characteristics of the borrower.

- Credit facilities: these were traditionally obtained from financial institutions; however, third-party alternative lenders specialising in distressed financing could also be a suitable option. Loan financing requires a specific loan agreement to be drafted. The agreement contains specific clauses and undertakings granted by the borrower. The borrower often undertakes to communicate its financial wealth and various key financial indicators on a regular basis. If those indicators appear to be below a certain threshold, the loan may be accelerated, and the borrower may be obliged to reimburse earlier than initially expected.
- Issuance of bonds or notes to private investors or to the market through stock exchanges: debt instruments offer much more flexibility than loan agreements and can be completely tailor-made to the specific needs and requests of the lenders. They can also be converted into equity in predetermined situations, offering more comfort and security to lenders. Debt instruments can be transferable or non-transferable, providing even more flexibility to investors. Raising debts on the public markets may be difficult for companies in financial difficulty because the specific regulations of debt capital markets oblige issuers to communicate their financial situations and disclose information regularly to offer enhanced protection to potential and existing investors.

Reorganising existing debt

Financial reorganisation also exists in new arrangements of existing financings that are already in place. It concerns both financing with third parties and intra-group arrangements.

- Subordination between senior and junior lenders: depending on the circumstances, different rankings and privileges could be allocated among creditors of the same company. Senior creditors will benefit from a better ranking in respect of priority of payment compared with pari passu creditors and junior creditors, which would be the last to be paid. Subordination agreements are generally negotiated as soon as new debt is subscribed for by the debtor. During periods of restructuring, common practice is to amend existing subordination agreements or to conclude new subordination agreements, with the objective of arranging priority of payments among creditors.
- Intra-group financings: to assist a company that may be in financial difficulty, another company from the same group may lend or shift financial resources. Assistance could take the form of intra-group loans or facilities. Other mechanisms, such as cash or cash-pooling agreements, allow for the transfer and management of liquidity among companies belonging to the same group and may be extensively used in the context of restructuring.

Security arrangements

External financing almost always requires the borrower to provide security to guarantee that it will comply with its obligations. Pursuant to a law dated 5 August 2005, Luxembourg has developed a specific framework for financial collateral arrangements. This specific framework focuses on financial obligations and is particularly adapted to the restructuring scenario as it offers numerous bankruptcy protections in favour of the guarantee's receiver.

- Extension of existing security arrangements: in the context of a restructuring, existing creditors often try to increase their levels of protection by extending the security granted from their debtors. New conditions may be negotiated, such as obligations to provide more frequently information on the financial situation of the company that granted the security or easing the conditions that would trigger automatic enforcement of the security in case of default.
- New security arrangements: any new financing will be linked to new security. Share capital, bank accounts and receivables are the assets of a company that are the most subject to collateral. If some assets have already been pledged in favour of existing creditors, those assets may still be subject to second- or third-ranking pledges for the benefit of new creditors.

Conclusion

In a constantly moving environment, reorganisation and restructuring of Luxembourg-based companies occur on a daily basis. Corporate and financial tools are available to assist managers and professional advisers of companies that are in need of change. A broad range of insolvency proceedings are also available, although reorganisation procedures do not appear to be used often nor do they appear to be useful in practice. A long-awaited reform should be implemented in the near future and provide new possibilities for Luxembourg-based companies to negotiate with their creditors and find suitable arrangements while trying to restructure.

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Basile is a banking and finance partner of AKD, based in Luxembourg. His practice mainly covers secured lendings, structured finance, debt capital market and financial regulatory work. Among other things, he has accumulated in-depth knowledge and experience of securitisation and alternative investment financing. He also has sound experience in private equity structuring and investment fund financing.

Basile advises a broad range of international and local clients that comprises multinational financial groups, high-wealth individuals and private equity houses.

He is recognised as an efficient Luxembourg finance lawyer in the main legal rankings with a strong client focus, and he has a track record in assisting numerous top-tier clients.

He is a current member of the Luxembourg bar and a former member of the Paris bar. Basile speaks French, English and German.

Nicolas Marchand
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Nicolas Marchand co-heads AKD's corporate department in Luxembourg. He practises in the area of corporate law, focusing on private equity, mergers and acquisitions, joint venture structures, cross-border reorganisations, participation plans and general counselling on corporate law matters.

Nicolas represents private equity houses, institutional investors and large corporations in domestic and cross-border transactions. He has extensive deal experience across many industry sectors, with a particular focus on the real estate and private equity sectors. He is appreciated by his clients for his proactive approach and practical advice.

With over 475 lawyers, tax advisers, civil law notaries and support staff in the Netherlands, Belgium and Luxembourg, AKD is a leading Benelux law firm. For clients, the firm is the gateway from, to and within the Benelux nations.

For over a century, AKD has combined a full-service approach and a broad sector focus to consider any question from a range of angles and to provide quality solutions anywhere in the world from the firm's own offices as well as through its various country teams and extensive, worldwide network. Practising Dutch, Belgian and Luxembourg law, the firm has the size, expertise and experience to assist in national and international mergers and acquisitions, solve complex public sector issues, conduct minor and major litigation, and advise in substantial projects, such as those regarding energy transition and issues concerning privacy and data security.

AKD's goal is to offer clients the best advice possible in a contemporary, efficient manner, which is why various fee arrangements are offered. Any fee arrangement is negotiable, from fixed hourly rates to fee caps, and from contingency fees to success fees.

Whether it is doing business or winning cases, AKD helps clients do both. The firm's committed, ambitious professionals have no use for legalese, turning the complex into the coherent for clients. Rather than leaving doubts to linger, AKD resolves them: exactly as clients would expect from advisers.

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