The Acquisition and Leveraged Finance Review

Third Edition

Editor
Christopher Kandel

Law Business Research

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EDITOR'S PREFACE

Acquisition and leveraged finance is a fascinating area for lawyers, both inherently and because of its potential for complexity arising out of the requirements of the acquisition process, cross-border issues, regulation and the like. It can also cut across legal disciplines, at times requiring the specialised expertise of merger and acquisition lawyers, bank finance lawyers, securities lawyers, tax lawyers, property lawyers, pension lawyers, intellectual property lawyers and environmental lawyers, among others. An additional area of complexity and interest at the moment comes out of market forces that are driving convergence in the large cap leveraged financings between loan and high-yield bond products generally, as well as between different markets (particularly pressure on markets outside the United States to conform to terms available in the US market but sometimes also vice versa), and in some cases the market is still debating whether to adjust for differences in bankruptcy, guarantee or security regimes.

The Acquisition and Leveraged Finance Review is intended to serve as a starting point in considering structuring and other issues in acquisition and leveraged finance, both generally but also particularly in cases where more than just an understanding of the reader's own jurisdiction is necessary. The philosophy behind the sub-topics it covers has been to try to answer those questions that come up most commonly at the start of a finance transaction and, having read the contributions, I can say that I wish that I had had this book available to me at many times during my practice in the past, and that I will turn to it regularly in the future.

Many thanks go to the expert contributors who have given so much of their time and expertise to make this book a success: to Nick Barette and Gideon Roberton at Law Business Research for their efficiency and good humour, and for making this book a reality; and to the partners, associates and staff at Latham & Watkins, present and past, with whom it is a privilege to work. I should also single out Sindhoo Vinod, Aymen Mahmoud, Angela Pierre and Oliver Browne for particular thanks – their reviews of my own draft chapters were both merciless and useful.

Christopher Kandel
Latham & Watkins LLP
London
August 2016

Chapter XX

LUXEMBOURG

Laurence Jacques and Thomas Bedos[1]

I OVERVIEW

The major part of acquisition financing in Luxembourg mainly consists of bank loans (straight loans, syndicated loans, etc.), mezzanine loans (by junior lenders) and debt and equity-tainted debt instruments granted by shareholders or PE investors (including hybrid debt instruments such as preferred equity certificates, convertible preferred equity certificates, convertible and redeemable bonds). Almost all financing transactions include senior debt (for the largest amount) and junior debt (provided by shareholders, sponsors or other banks). Luxembourg is a particularly attractive location to set up the acquisition platform of a local acquisition special purpose vehicle (SPV), as its regulatory environment offers a wide panel of financing and debt instruments to investors, endowed with hybrid features likely to optimise the tax efficiency of acquisition transactions. A sizeable number of international and EU acquisitions are channelled through Luxembourg to benefit from those hybrid features.

Financial collateral arrangements governed by the Law of 5 August 2005 (the Financial Collateral Law), otherwise known as 'bankruptcy remote security packages', have proven to be a formidable weapon in facilitating the immediate take over of assets and out-of-court restructurings under the control of creditors. Similarly, the Luxembourg courts have demonstrated their willingness to adopt a consistent and pragmatic approach in their interpretation of the Financial Collateral Law, thereby enhancing the attractiveness of the jurisdiction for lenders.

II REGULATORY AND TAX MATTERS

i Licensing requirements

Most Luxembourg leveraged financing activity is carried out by foreign or European banks benefiting from the EU freedom of services, investment funds, pension funds, securitisation

1 Laurence Jacques is a partner and Thomas Bedos is a senior associate at Vandenbulke.

companies or PE investors. As a result of its relatively small territory, the loan activity of local banks and financial institutions is relatively limited. In addition, most bank activities are geared towards commercial rather than investment credit, and private banking remains the core of their business activities.

Banking and financial carried out performed in Luxembourg are regulated by the Law of 5 April 1993 relating to the financial sector (the Law on the Financial Sector). The core activities of credit institutions – deposit taking and lending to the public – are regulated in Luxembourg and subject to the general prudential supervision of the Luxembourg financial regulator, the CSSF. Professionals engaged in the sole business of granting loans to the public for their own account must also obtain an authorisation as a professional of the financial sector from the CSSF.[2]

There is no material restriction on cross-border lending. EU credit institutions may grant credit through a branch or in accordance with the rules relating to freedom to provide services as long as this activity is regulated and supervised in their home country.

Loan origination activities performed by undertakings for collective investments (UCIs) alternative investment funds (AIFs), securitisation vehicles, specialised investment funds (SIFs), pension funds or investment companies in risk capital (SICARs) do not require authorisation as professional lenders.[3]

Similarly, lending activities performed on single or ancillary basis, intragroup lending and loans granted to a limited number of persons do not require such authorisation.[4]

In a broader sense, any type of funding can be freely granted to Luxembourg entities as long as it does not qualify as financial sector activity, meaning the activity is not carried out in a professional and usual way in Luxembourg or the lender is subject in its home country to prudential supervision equivalent to that exercised by the CSSF.

ii Sanctions, anti-corruption and money laundering

Entities subject to prudential supervision that fail to comply with the laws, regulations, statutory provisions or regulatory instructions may trigger the application of administrative and criminal penalties. Administrative sanctions range from a simple warning to a temporary or definitive ban on the entity or its directors performing one or several types of financial activity in Luxembourg.

The unauthorised exercise of any activity reserved to credit institutions may trigger administrative penalties and criminal sanctions, including imprisonment of up to five years and fines of up to €125,000.

In terms of anti-money laundering regulations, following recommendations from the OECD's Financial Action Task Force (FATF), Luxembourg carried out a fundamental reform of its legislation and adopted the Law of 27 October 2010. This legislation broadened the definition of money laundering, expanding the list of primary infringements and the types of professionals concerned and reinforcing professional obligations. In Luxembourg, anti-money laundering rules are not limited solely to banks, but also apply to any participants in the financial sector, including service providers (auditors, chartered accountants, lawyers, etc.).

2 Article 28-4 of the Law on the Financial Sector.

3 Q&A of the CSSF on the status of PSF – Part II – pages 29, ff. version of 30 November 2015.

4 Ibid.

The anti-money laundering legislation requires financial actors to verify the identities of their clients or the beneficial owners of any assets before a business relationship can be established or a transaction concluded. Throughout the client relationship, professionals are required to examine transactions – more particularly regarding the sources of funds – and must report any indications of money laundering to the public prosecutor's financial information unit. It should be noted that banking secrecy laws do not apply during money-laundering prosecutions.

iii Other major regulatory concerns for debt finance

Banking sector

The Luxembourg credit industry is facing the new wave of regulatory and reporting obligations resulting from the financial crises, mainly through EU regulations. These impose new organisational and technical constraints on financial institutions, which are now subject to a whole set of new regulatory requirements, in particular following the implementation of the Capital Requirement Directive IV package and its subsequent regulations.

The Bank Recovery and Resolution Directive of 15 May 2014 (2014/59/EU) has been transposed into Luxembourg law[5] and recasts the guarantee deposit system applicable in Luxembourg. It also reshapes the Luxembourg legal framework applicable to the resolution and liquidation of credit institutions.

Automatic exchange of information

New reporting obligations have been recently implemented in Luxembourg. The Law of 18 December 2015 on the automatic exchange of financial account information (the AEoI Law)[6] entered in force on 1 January 2016. Financial institutions (FIs) in participating jurisdictions[7] will be able to collect relevant tax information about their clients (including account holders, beneficial owners and potentially controlling persons ('investors')) residing in other participating jurisdiction by enhancing their due diligence procedures. FIs will have to report such information to the local tax authorities. Subsequently, the local tax authorities of the FI will exchange the information with their counterparts in participating jurisdiction in which the investors are taxed.

The FATCA Law dated 24 July 2015 implemented the intergovernmental agreement entered into on 28 March 2014 between the Grand Duchy and the United States to comply with the FATCA regulation in force in the United States of America. This requires that any foreign financial institutions report to the US tax administration any US account holders (and US beneficial owners of passive non-financial foreign entities). FATCA imposes a 30 per cent US withholding tax on US-sourced payments to foreign financial institutions (including banks, brokers, custodians and investment funds) that fail to comply with the FATCA rules.

5 Law of 18 December 2015 on the resolution, reorganisation and winding-up measures of credit institutions and certain investment firms and on deposit guarantee and investor compensation schemes (the BRR Law)

6 Implementing the OECD standard on the automatic exchange of information.

7 As defined in the OECD Common Reporting Standard (CRS).

iv Tax matters

As a matter of principle, the potential tax issues to tackle in acquisition leveraged finance are mainly related to the interest deduction at the level of the borrower, as well as the withholding tax exposure on the service of the debt.

Under the amended Income Tax Act of 4 December 1967 (the Tax Act), interest paid by a Luxembourg-resident debtor to an arm's-length non-resident creditor will not generally be subject to Luxembourg withholding tax, except in very limited cases (i.e., profit-sharing bonds or notes). If the interest payment is made for the intermediate benefit of an individual beneficial owner who is resident of Luxembourg, it may be subject to a withholding tax of 10 per cent according to the Luxembourg law dated 23 December 2005.[8]

Based on the upcoming tax measures announced by the Luxembourg government on 29 February 2016, it is foreseen that from tax year 2017, the aforementioned 10 per cent withholding tax will increase to 20 per cent; however, the implementation of this increase will strictly depend upon the outcome of the parliamentary discussion and final approval.

There are no specific thin capitalisation rules in Luxembourg in respect of bank or unrelated financing and if, for example, an investor wants to leverage an acquisition as far as possible with bank debt, Luxembourg tax law would generally be very flexible and not impose any strict debt-to-equity ratios on ordinary taxable companies.

Informal limits are, however, applied by the tax authorities for the financing of acquisitions of shareholdings by intragroup loans. The Luxembourg tax authorities generally consider a ratio of 85:15 as being in line with the arm's-length principle, which means that up to 85 per cent of the purchase price of the participations can be financed by interest-bearing intragroup loans. Interest rates must be in line with the arm's-length principles evidenced by the transfer pricing report.

For the purposes of determining the debt-to-equity ratio, an interest-free loan from shareholders may be treated as equity for corporate income tax purposes, so it may be possible to structure funding with a 99:1 debt (interest-free or bearing)-to-equity ratio. A debt-to-equity ratio of 99:1 could also be achieved by using certain exit instruments such as tracking loans.

Funding structures should be analysed on a case-by-case basis. Any excess interest payments that result from an excess over the aforementioned debt-to-equity ratio would be reclassified as hidden profit distributions, subject to withholding tax at the 15 per cent rate generally applicable to dividends payments, unless the recipient qualifies for the affiliation privilege in Luxembourg.

At the borrower level, the interest payments or accruals on a financing instrument considered as debt for tax purposes can be deducted from its taxable basis. This is subject, however, to applicable limitations such as the 85:15 debt-to-equity ratio.

This may be further affected by the Anti-Tax Avoidance Directive formally adopted by the European Council on 12 July 2016, to be transposed into national law by 31 December 2018.

The upcoming exit of the United Kingdom from the EU should not have *a priori* any adverse effect when structuring the acquisition finance between Luxembourg and the

8 Also referred as the RELIBI Law '*Retenue à la source liberatoire*' related to payments of interest or similar income made since 1 January 2006 (but accrued since 1 July 2005).

UK as the applicable zero rate withholding tax by the EU Directive would be substituted by the provisions of the double tax treaty between Luxembourg and the UK, which currently provides for a full exemption on interest payments.

III SECURITY AND GUARANTEES

i Security packages

Luxembourg is known as one of the best places in the world in which to enforce security interest.[9] Security packages in acquisition finance transactions generally include financial collateral arrangements on claims, bank accounts and financial instruments, guarantees and mortgages on immoveable assets.

A Luxembourg debtor is allowed to grant security on all its (present and future[10]) assets. There are only limited restrictions on the granting of security to third parties provided for by law; the most salient example relates to Luxembourg securitisation companies who can only grant security on their assets to secure obligations they assumed for securitisation purposes or in favour of their investors (or their fiduciary representative) or in favour of the issuing vehicle participating in the securitisation.[11]

Luxembourg law does not provide for the creation of floating charges or debentures equivalent to those known in Anglo-Saxon jurisdictions. Luxembourg companies are, however, allowed to grant floating charges or debentures on their assets located abroad.

Pledges on business assets such as stock, customers, IP or equipment have a fewer attractions: they can only be granted in favour of certain institutions,[12] the pledgees are further subject to governmental approval, only 50 per cent of the business assets can be secured, they have a limited 10 year-duration and they are subject to registration formalities and duties.

Security on financial instruments and claims

Security arrangements on financial instruments and claims are governed by the Financial Collateral Law.[13] Financial collateral arrangements can take the form of a pledge, a transfer of title for security purposes, a repurchase agreement or fiduciary agreement and can cover any type of financial instruments (shares, bonds, units, options, loan notes, securities, etc.[14]) and claims (e.g., arising from a loan or a sale and purchase agreement, or monetary claims on a bank account) regardless of their governing law.

Financial collateral agreements must be capable of being evidenced in writing, on paper or in electronic format or any other durable medium, allowing the identification of the secured assets. There is no particular formalisation procedure required to create a security on financial instruments or claims.

9 World Bank Report Doing Business 2016.

10 With the exception of mortgages.

11 Article 61(3) of the Law of 22 March 2004 on Securitisation. Any security granted beyond these restrictions is void by operation of law.

12 Credit institutions and breweries

13 The Financial Collateral Law implements the directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

14 Article 1 of the Financial Collateral Law gives a very broad definition of financial instruments.

Depending on the type of secured assets, the performance of dispossession formalities is required to ensure the perfection of a financial collateral agreement.

Parties to a financial collateral agreement can freely determine the exercise of their rights during the secured period, theirs right to use the secured assets, and the enforcement event.

Financial collateral agreements can validly be granted to a security agent, a trustee or a person acting for account of one or several beneficiaries as long as such beneficiaries are determined or determinable. They can secure any present and future liabilities of a debtor without need for further identification.

Creditors benefiting from a financial collateral arrangement have rights *in rem* on the secured assets, giving them full and direct access to the secured assets on the enforcement event, and without need for prior notice.

Enforcement methods may vary depending on the type of assets secured and the agreement of the parties. There is no requirement to initiate any proceeding in court before enforcing a financial collateral agreement. The Luxembourg judge's role is strictly limited to *a posteriori* control that the financial collateral agreement has been enforced in accordance with its terms and the law.

Pledge over shares

Security over shares commonly takes the form of a pledge. A pledge will only be enforceable if the possession of the shares has been transferred to the pledgee. Valid perfection of the pledge on shares is achieved as follows:

a book entry shares: a notice of pledge must be served on the custodian or registered in the custodian's account where the shares are deposited;

b bearer shares: the pledge must be registered in the register of bearer shares held by the depositary; and

c registered shares: the pledge must appear in the register of registered shares.

In most cases, pledge agreements over shares provide the ability for pledgees to use the rights attached to the shares (rights on distribution and dividends, voting rights) upon the occurrence of a triggering event defined by the parties. On such event, the pledgee can use the voting rights attached to the pledged shares to change the directors of their debtors and exercise an indirect and soft control on the assets. Upon the replacement of management, lenders generally enter into a standstill agreement with the newly appointed directors with the view to organising a smooth sale of the debtor's assets in the interests of all stakeholders.

Realising shares under a Luxembourg law pledge can be made through various methods, the most common being: (1) the direct appropriation by the pledgee; (2) the appropriation being made by a third party (generally an SPV) designated by the pledgee; and (3) the direct sale of the shares to a third party.

The appropriation (whether directly or through a designated SPV) can be made immediately, without notice, upon the occurrence of the agreed enforcement event. The appropriation must be made at a price fixed in accordance with the valuation method agreed between the parties; the valuation can always be made after the appropriation. This appropriation method serves the dual purpose of allowing immediate enforcement of the pledge (in a few minutes) and giving lenders the flexibility to appoint a third party to take control of the debtor without needing to become a shareholder.

A sale of the pledged shares must be made under normal commercial conditions. 'Normal market conditions' are not further defined by the Financial Collateral Law and the

Luxembourg court has had only one opportunity – in 2010[15] – to give an interpretation of this concept. In substance, the court considered that a sale under 'normal market conditions' would need to be concluded under conditions resulting from a free trade market at the time of realisation, taking into account the information available at the time of the realisation, the nature of the pledged assets and the specific outlines of the market. In the absence of a regulated market, the best offer is the offer available under the conditions applicable to the assets at stake.

Pledge over claims or receivables

A pledge over claims or receivables under a contract is perfected through the notification of the pledge to the debtor of the pledged claims or receivables, or its acceptance of the pledge. In practice, the debtor of the pledged claims or receivables is made a party to the pledge agreement to ensure immediate perfection of the pledge upon its execution.

Enforcement methods for a pledge over claims or receivables are similar to those available for the pledge over shares. In practice, the pledgee will step into the shoes of the pledgor by serving a notice to the pledgor that it has appropriated the relevant claim or receivable and will obtain direct payment in its hands.

Pledge over bank accounts

Under Luxembourg law, a security over bank accounts is materialised by a pledge over monetary claims (and not on the bank account itself). A pledge over bank accounts is validly perfected through the service of a notice of pledge to the bank where the account is opened and where the cash is credited, or when the bank has accepted the pledge.

In practice, the lenders will seek to obtain the bank's approval to release any of its priority rights on the bank accounts, which are generally granted under the bank's general terms and conditions.

Enforcement of a pledge over bank accounts is made upon the occurrence of an enforcement event by a notification to the bank. The pledgee will have the right to operate the bank account, request the transfer of all funds credited on the bank account or close the account.

Guarantees

Luxembourg law provides for specific personal security interest such as suretyships and guarantees on first demand.

A personal or joint guarantee will generally qualify under Luxembourg law as a suretyship. Unless expressly waived at the time the suretyship is granted, a guarantor benefits from various defences, allowing it to a certain extent to delay or deny the enforcement of its own obligations. Arguments generally invoked are the absence of default of the borrower, or the non-performance by the lender of its own obligations, or the invalidity of the (joint) guarantee.

A guarantor under a first-demand guarantee undertakes to pay a fixed amount to the beneficiary, irrespective of the obligations guaranteed. The payment obligation under a first demand guarantee is deemed abstract and autonomous. The guarantor is bound to pay the full amount it has agreed to guarantee and is deprived of the right to raise any defences with respect to the validity or enforceability of the obligations guaranteed.

15 Tribunal d'arrondissement de Luxembourg, 20 May 2010.

Mortgages on immoveable assets

The most common type of security on immoveable assets is the contractual mortgage, which must be made through notarial deed and registered with the Registration and Domains Authority. Contractual mortgages have a limited duration of 10 years, which is renewable.

ii Limitations

Legal specialty

A transaction concluded by a Luxembourg company must be made in compliance with company law and have a lucrative purpose.

Corporate purpose

The granting of security interest or guarantees must fall within the corporate purpose of the Luxembourg guarantor, which is set out in its articles of incorporation. Non-compliance with such corporate purpose may lead to the judicial cancellation of the agreement at the request of the counterparty, acting in good faith.

Financial assistance

Luxembourg public companies limited by shares (SAs) and companies governed by rules applicable to SAs[16] are not allowed to advance funds, grant loans or provide security for the acquisition of their own shares by a third party.[17] A breach of this financial assistance prohibition may result in civil and criminal liability for the parties involved in the transaction. The transaction may further be cancelled.

This prohibition does not apply to transactions undertaken by banks and financial institutions during their ordinary course of business, or transactions in which shares are acquired by, or for the benefit of, employees.

Financial assistance is allowed provided the company complies with the 'whitewash procedure', which requires, *inter alia*, that the transaction be carried out at fair market conditions, the company have distributable reserves in the amount of the financial assistance granted, and the transaction be approved by the shareholders, subject to a detailed published management report on the transaction.

Corporate benefit and guarantee limitation

In cross-border financing transactions, Luxembourg companies frequently provide security interests and guarantees to secure the obligations of their direct or indirect parent companies (upstream and downstream guarantees) or sister companies (cross-stream guarantees).

Lacking a definition of 'group of companies' in Luxembourg law whereby the interests of the group could override those of a single company, the validity of cross-stream or upstream guarantees will ultimately depend on a corporate benefit analysis by the grantor. In particular, the guarantor should have some individual interest (consideration) in the transaction and the expected benefit deriving from the guarantee should outweigh the risks taken in granting the

16 Corporate partnerships limited by shares and simplified joint-stock companies.

17 Article 49-6 of the Law dated 10 August 1915 on Commercial Companies (the Company Law).

cross-stream or upstream guarantee. The financial liability resulting from a guarantee should not exceed the financial capacity of the guarantor and, more specifically, should not send the guarantor into an insolvent position.

iii Clawback on insolvency

Transactions can only be clawed back or challenged in a bankruptcy. A clawback is initiated by the receiver and debated in court. Only specific transactions can be challenged.

Transactions entered into during the hardening period[18] may be declared invalid if they constitute the preferential satisfaction of one creditor over another.

The rights of creditors benefiting from a security governed by the Financial Collateral Law, even granted during the hardening period, are not affected by a bankruptcy or reorganisation proceedings and therefore remain enforceable.

The court can cancel the following transactions: disposals of assets without adequate consideration; payments made for debts not yet due; payments of due debts by means other than cash or bills of exchange; and granting of any security for a debt contracted before the hardening period.

Any payment for accrued debt or any transactions against money made after a company has ceased its payments and before the bankruptcy judgment may be cancelled by the court if the beneficiary of the payment or the contracting party was aware of the debtor's cessation of payments.

Mortgages granted during the hardening period (or 10 days before) may be cancelled if their registration was not carried out within 15 days of conclusion of the mortgage agreement.

As a general principle, payments made with the intention of defrauding creditors of their rights are void irrespective of the day on which they were made.

IV PRIORITY OF CLAIMS

i Preferred creditors

The following claims have statutory priority rights for reimbursement over the insolvency estate's creditors:

- *a* judicial expenses (including bankruptcy receiver's fees);
- *b* funeral expenses;
- *c* fees and expenses for terminal illness; and
- *d* public treasury claims and salary debts.

The Luxembourg Civil Code lists the claims benefiting from a general preferred right on a debtor's moveable or immoveable assets. These preferred rights supersede any security *in rem* granted to a creditor.

Securities granted to creditors over financial instruments or claims under the Financial Collateral Law remain enforceable despite the opening of a bankruptcy or reorganisation proceedings.

18 The period fixed by the Luxembourg courts up to six months before the bankruptcy judgement and up to 10 days before this period (Article 445ff of the Commercial Code).

ii Intercreditor and subordination agreements

For multijurisdictional syndicated facilities, the borrowers and the lenders will commonly enter into a foreign-law intercreditor agreement based on Loan Market Association (UK) standards. Such intercreditor agreement will determine the rights of each class of creditors (senior, mezzanine and junior) with respect to, in particular, their rank and subordination, the payments arrangements and the enforcement of security interests.

In mid-cap transactions or straight loans, the borrower's sponsors and the lenders will generally enter into a subordination agreement whereby the sponsors agree to the full subordination of their claims to the full repayment of the bank loan. In limited cases, the sponsors are entitled to certain 'permitted payments'.

Luxembourg law does not prevent creditors from agreeing on the rank of their respective claims. Case law and Luxembourg legal scholars recognise the validity of contractual subordination arrangements. Such agreements are effective towards third parties and courts would normally enforce them.

V JURISDICTION

i Choice of law and jurisdiction

Most financing transactions in Luxembourg are made by inbound foreign banks, financial institutions and professionals investors. Transactions tend therefore to be governed by the law that is most familiar to the financing parties, which is generally their own domestic law, for example English, New York, German or French law. Luxembourg security packages on Luxembourg located assets are generally governed by Luxembourg law.

Rules governing of choice of law for countries in the EU are determined by the Rome I Regulation[19] for contractual obligations and the Rome II Regulation for non-contractual obligations.[20]

The Luxembourg courts will generally recognise and apply the foreign law chosen by the parties unless the application of the foreign law would result in a solution manifestly incompatible with Luxembourg public policy or the courts are required to take into account overriding mandatory provisions of Luxembourg law.

Similarly, the submission by a Luxembourg company to the jurisdiction of a foreign court will be recognised as valid and binding on the company if it was made in good faith and with no intention of circumventing the mandatory provisions of Luxembourg or foreign laws.[21]

19 Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

20 Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations.

21 Regulation EU No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

ii Enforceability of foreign judgment

In accordance with the Brussels Ibis Regulation,[22] any final and conclusive judgment rendered in another EU Member State will be immediately enforceable in Luxembourg without re-examination of the merits of the case.

Luxembourg courts may, however, refuse to recognise a foreign judgment if the recognition would be manifestly contrary to Luxembourg public policy or incompatible with an earlier judgment or if the defendant has been defaulting.

Other foreign judgments will be recognised and enforced in Luxembourg but require the filing of an *exequatur* procedure.[23] Luxembourg courts will make a deeper review of the foreign judgment and verify, notably, the enforceability of the foreign judgment in the jurisdiction in which it was rendered, the competence of the foreign court, the legal local procedures, the respect of the rights of defence, the law applied to the judgment, and the absence of fraud and violation of Luxembourg international public policy.

Regulation (EC) 805/2004 of 21 April 2004, creating a European enforcement order for uncontested claims, provides for the abolition of *exequatur* for judgments on uncontested claims.

VI ACQUISITIONS OF PUBLIC COMPANIES

Luxembourg regulations related to takeover bids or squeeze-outs may affect the financing of acquisition of Luxembourg companies listed on an EU or EEA-regulated market.

Under the Takeover Law,[24] an offeror must announce a bid only after ensuring that it can fully provide a cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration. The offeror must therefore ensure that it has obtained the necessary financing from its lenders to cover the settlement of all the tendered shares. Preconditions to a bid are not permitted unless they are official authorisations or regulatory clearances. This entails that a bid must not normally be subject to any financing conditions or preconditions (other than regulatory clearances), and funds must be available to implement the bid.

The Luxembourg Squeeze-Out Law[25] came into force on 1 October 2012. This completes the Luxembourg legislation applicable to majority shareholders of listed companies in takeover bids. It further provides for a forced sale by minority shareholders when the majority shareholder holds 95 per cent or more of the share capital and voting rights of a quoted company.

According to the Takeover Law, if the enforcement of a share pledge by way of appropriation exceeds the threshold of one-third of the voting rights of the target companies, the lender will have to issue a mandatory bid to the remaining shareholders. Similarly, under

22 Ibid.

23 Article 678 of the New Luxembourg Code of Civil Procedure.

24 Law dated 19 May 2006 on takeover bids, as amended (the Takeover Law) implementing Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids into Luxembourg law.

25 Law of 21 July 2012 on mandatory squeeze out and sell-out of securities of companies currently admitted to trading on a regulated market.

the Squeeze-Out Law, if a lender enforces a share pledge by way of appropriation over a number of shares exceeding the threshold of 95 per cent of the voting rights and share capital of the target company, it may be required to purchase the shares of minority shareholders.

Under the Takeover Law, the bidder must disclose in its offer document all the information necessary to enable the holders of the offered company securities to reach a properly informed decision on the bid. This expressly includes information concerning the financing for the bid.

The CSSF remains the competent authority to control the compliance of the bidder with market transparency principles and ensure that the rights of securities of any company affected by the bid are protected.

VII OUTLOOK

New legislation will be coming into force in Luxembourg in 2016.

A law on the modernisation of company law was voted on by the Luxembourg parliament on 13 July 2016. This law will provide for more flexibility in the use of securities such as tracking shares, beneficiary units or convertible bonds. It also provides for the creation of a new form of company: the simplified joint-stock company, directly inspired by the French legislation.

The introduction of a new type of Luxembourg investment vehicle, the reserved alternative investment fund (RAIF) was also adopted by the Luxembourg parliament on 14 July 2016. The RAIF will be regulated under Directive 2011/61/UE of 8 June 2011 on Alternative Investment Fund Managers and will benefit from the corresponding EU passport, but will not be supervised by the CSSF.

LAURENCE JACQUES

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Laurence Jacques is a partner at Vandenbulke, leading the corporate and insolvency practice. She specialises in corporate and acquisition finance, M&A, domestic and cross-border insolvencies and restructurings, venture capital and private equity.

She is regularly appointed by Luxembourg courts as liquidator for investment funds or financial companies in distress and has been appointed as bankruptcy receiver of listed company Espirito Santo Financial Group, the holding company of the banking arm of Group Espirito Santo.

Ms Jacques has specific experience of advising financial institutions, lenders, investors, alternative capital providers, asset-based lenders and private equity funds on borrowings, new lending, restructurings, workouts and enforcements of debt and equity positions. She provides strategic advice in the enforcement process of loans to servicers, sellers of loans and mortgage-backed securities as well as to investors owning or acquiring stressed or distressed assets.

THOMAS BEDOS

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Thomas Bedos is a senior associate within Vandenbulke's investment funds department. He has experience in assisting clients that focus is mainly on the implementation of and the ongoing assistance to alternative investment structures (private equity, venture capital and real estate funds) mainly using the Luxembourg SIFs and SICARs.

His practice experience also includes advising local and international clients on all aspects of corporate law, in particular, the structuring of transactions and corporate reorganisations.

Mr Bedos has prior experience in the corporate departments of major law firms in Paris and has practised in different areas of law, including mergers and acquisition, bankruptcy or corporate law, allowing him to become involved in banking and finance, corporate law, contract law, real estate and investment funds.

He holds a specialised master's degree in international management and law from HEC Paris as well as a master's degree in business law from the faculty of Paris XII and passed his bar exam at Paris I Panthéon-Sorbonne.

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