

Enforceability of Luxembourg security interests in case of insolvency proceedings



Luxembourg has a well established international reputation as a financial and business centre. This derives from an essential element, among others, that Luxembourg is able to offer to their business operators: legal security. When granting loans, creditors (banks) need the security interests related to this loans to be provided with the maximum legal security, especially when it comes to their enforcement. If there is the risk that the security interest fails in the crucial moment, business operators tend to be reluctant to granting loans, which eventually affects the business climate of a financial place. Luxembourg has been aware of this risk and has proven itself to be extremely efficient with regard to the enforcement of Luxembourg security interests especially in case of insolvency proceedings.

Here we have highlighted the principal advantages of Luxembourg security interests in case of Luxembourg insolvency proceedings:

1. Assets subject to financial collateral arrangement fall out of the estate (*masse*) of creditors

Unlike the unsecured creditors, who are not able anymore to immediately enforce their rights against the company once the company has been declared insolvent, creditors benefiting from a security interest governed by the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended („Collateral Act“) fall, as a matter of principle, out of the estate (*masse*) of creditors and may fully enforce their rights without being affected by insolvency proceedings. In other words, except in case of fraud, when facing insolvency proceedings, the security interests governed by Luxembourg law may, as a matter of principle, not be challenged.

2. Enforceability at any time

Whereas the unsecured creditors could be affected by voidness of their claim in the suspect period, the Luxembourg security interests remain in principle enforceable even if they were concluded the day of or after the opening of the insolvency proceedings (to protect creditors in good faith) and may be enforced by creditors benefiting from such a security interest at any time, i.e. before, during as well as after the opening of insolvency proceedings.

[1] The Collateral Act, which transposed the European Directive 2002/47/CE of the European Parliament and of the Council dated 6 June 2002 (the „Collateral Directive“) covers four types of financial collateral arrangements: the pledge agreement, the transfer of title by way of security, the repurchase agreement and the trust-security agreement.

3. Immunity of foreign law governed security interests against Luxembourg insolvency proceedings

If the grantor of the security interest is a Luxembourg entity and the security interest is governed by Luxembourg law, the protection regime of security interests is fully applicable. This protection regime is extended to the case of Luxembourg insolvency proceedings where the grantor of the security interest is a Luxembourg entity and the security interest is however governed by a foreign law. Such foreign security interest is immune against Luxembourg insolvency proceedings and fully enforceable in Luxembourg (provided that the foreign law governed security interest is similar to a security interest governed by the Collateral Act).

The advantages of a validly perfected Luxembourg security interest makes it a cutting edge legal instrument that it is extremely difficult to challenge, except of course, in case of fraud. Especially during the financial crisis as from 2008 that was affected by series of bankruptcies and restructuring measures, Luxembourg security interests have undergone a strong stress test in respect of their legal efficiency and emerged more validated than before. It is a key strength of the Luxembourg security interests to have such a robust protection regime.

On 1 February 2013, a draft Act amending and restating Luxembourg insolvency proceedings has been presented to the Parliament (draft act n° 6539 in relation to the protection against corporate insolvency). The adoption of this law will induce substantial modifications to the legal framework for insolvency proceedings in Luxembourg. However, this Act should not affect the Luxembourg security interests and their immunity against insolvency proceedings, which is a further strengthening of the effectiveness of that instrument and the reason why banks and other institutionals appreciate being secured by Luxembourg security interests in their transactions.



Irma Sedlo
Associate