
CHAMBERS GLOBAL PRACTICE GUIDES

Banking & Finance 2024

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Luxembourg: Trends and Developments

Arnaud Arrecgros, Yann Hilpert, Maurice Honnen,
David De Pasquale and Arina Belikova
Maples and Calder



Trends and Developments

Contributed by:

Arnaud Arrecgros, Yann Hilpert, Maurice Honnen,
David De Pasquale and Arina Belikova

Maples and Calder

Maples and Calder is market leader in the provision of legal, fiduciary, fund, regulatory and compliance and entity formation and management services, with expertise across a range of jurisdictions, sectors and disciplines. With over 50 years' experience in the financial services industry and expertise in the provision of a wide range of domestic and international services, the Maples Group has become a global partner to its clients, with offices strategically situated to best serve their needs. The firm pro-

vides specialised fiduciary, fund administration, regulatory and compliance, entity formation and management and legal services on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. Over the course of five decades, the Maples Group has grown from modest beginnings into one of the world's preeminent professional services firms, with operations in the Americas and the Caribbean, Asia Pacific, Europe and the Middle East.

Authors



Arnaud Arrecgros is co-head of Maples and Calder (Luxembourg)'s Finance team at the Maples Group. He has extensive experience in cross-border financing and banking

transactions, including corporate debt facilities, acquisition, asset and real estate financing and restructurings, funds financing in connection with setting up bridge and capital commitment facilities, securitisations, and capital-markets matters. Arnaud represents both borrowers (including private equity and hedge funds) and lenders on transactions, advising, in particular, on the establishment of security packages and issues surrounding collateral within the context of debt-restructuring transactions.



Yann Hilpert is co-head of Maples and Calder (Luxembourg)'s Finance team at the Maples Group. With over 20 years' experience practising in Luxembourg, Yann focuses on

leveraged finance, secured lending transactions, fund finance, securitisation, asset finance and debt capital markets. He advises private equity houses, alternative investment funds, financial institutions, multinational companies and high net worth individuals. Yann joined the Maples Group in 2024. He was previously a partner at AKD in Luxembourg and, prior to that, worked for Dentons in Luxembourg.

LUXEMBOURG TRENDS AND DEVELOPMENTS

Contributed by: Amaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder



Maurice Honnen is an associate in Maples and Calder (Luxembourg)'s Finance team at the Maples Group, advising on various types of cross-border financing and banking

transactions, as well as on securitisations and capital-markets matters. Maurice joined the Maples Group in 2019, having previously worked for the banking & finance team in the Luxembourg office of an international law firm.



Arina Belikova is an associate in Maples and Calder (Luxembourg)'s Finance team at the Maples Group, advising on various types of cross-border financing and banking

transactions, fund finance, international bond issues, and structured finance deals, as well as securitisations and capital-markets matters.



David De Pasquale is Of Counsel in Maples and Calder (Luxembourg)'s Finance team at the Maples Group. His practice involves advising institutional lenders and borrowers

(corporations, private equity groups and investment funds clients) on cross-border financing transactions. David also advises clients on securitisation and capital-markets transactions.

Maples and Calder

Maples and Calder SARL
12E, rue Guillaume Kroll
L-1882
Luxembourg

Tel: +352 28 55 12 00
Web: www.maples.com/locations/luxembourg



Contributed by: Arnaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder

Luxembourg law of 7 August 2023 on the preservation of companies and the modernisation of bankruptcy law (the “Reorganisation Law”) and its corresponding impact in the context of finance transactions.

The Reorganisation Law, which transposes into national law Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (the “Restructuring Directive”), entered into force on 1 November 2023.

The Restructuring Directive seeks to harmonise insolvency procedures across member states in order to ensure that:

- effective national restructuring frameworks are in place to support the continued operations of viable enterprises and entrepreneurs facing financial difficulties;
- honest insolvent or over-indebted entrepreneurs are granted a second chance and can benefit from a full discharge of debt after a reasonable period of time;
- continued employment is supported at struggling companies; and
- the effectiveness of procedures applicable to restructuring, insolvency and discharge of debt, in particular with respect how much time such procedures require, is consistent improved.

Notable Features

The Reorganisation Law is applicable to artisans, merchants, commercial companies as referred to in Article 100-2, paragraph 1 of the

Luxembourg law on commercial companies (the “Companies Law”), special limited partnerships as referred to in the Companies Law and civil companies. It is not applicable to certain entities, including, notably, among others, credit institutions, insurance companies, UCITS, SIFs, RAIFs, SICARs or securitisation vehicles issuing securities on a continuous basis to the public under the 2004 Luxembourg Securitisation Law.

The Reorganisation Law modernises Luxembourg’s approach to dealing with enterprises in difficulty through the elimination of outdated procedures (controlled management (*gestion contrôlée*)) and composition with creditors (*concordat préventif de faillite*) and the introduction of new procedures, which can be classified as out-of-court measures or judicial reorganisation (*réorganisation judiciaire*). The Reorganisation Law also changes the qualification of fraudulent bankruptcy from a crime to an offence, and grants the public prosecutor standing to move for the opening of bankruptcy proceedings.

The out-of-court measures involve the detection by the Luxembourg Ministry of the Economy or the Luxembourg Ministry for Small and Medium Sized Businesses, as applicable, of enterprises facing financial difficulties. Indicators of financial difficulties can include overdue tax and/or social security liabilities and court judgments. As part of this process, the relevant Luxembourg ministry can request that the debtor provide additional information about its financial situation and inform the ministry of potential reorganisation measures. Depending on the severity of the situation, a business conciliator (*conciliateur d’entreprise*) or a court-appointed expert (*mandataire de justice*) may be designated. In this process, the debtor can negotiate an out-of-court settlement agreement (*accord amiable*) with a minimum of two of its creditors to reor-

Contributed by: Arnaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder

ganise all or part of its activities and assets. The settlement agreement is rendered enforceable through court approval.

Judicial reorganisation is a process overseen by the courts, and is opened upon court order following the filing of a writ by the debtor or a third party. The procedure can involve the designation of a court-appointed expert or, at the request of one of the parties or the public prosecutor, a temporary administrator (*administrateur provisoire*) in more dire circumstances involving gross or material failures by the debtor. A debtor being in a state of bankruptcy does not prevent the opening of a judicial reorganisation, and the debtor may not be declared bankrupt during a judicial reorganisation procedure.

Under the judicial reorganisation procedure, the court will order a stay of payments (*sursis*) for up to four months. This period can be extended for up to twelve months, during which time creditors are generally prohibited from enforcing payment of stayed claims. During the stay, contracts are not terminated, and penalty clauses (including with respect to interest) are without effect.

The judicial reorganisation procedure can be concluded, with court approval, through a settlement agreement with creditors, a collective agreement with creditors, or a cross-class cramdown in circumstances where creditors who are authorised to vote on a plan ultimately do not support it. Another form of resolution is a court-ordered third-party transfer of the debtor's assets or business activities.

Impact on Agreements Governed by the Collateral Law

One of the hallmarks of the Luxembourg Law of 5 August 2005 on financial collateral arrangements (*Loi modifiée du 5 août 2005*) (the “Collat-

eral Law”) contributing to its longstanding appeal for creditors has been that enforcement of collateral grants governed by it have been insolvency remote (the “Enforceability Principle”).

Based on various factors (namely the parliamentary works prior to the adoption of the Reorganisation Law and meaningfully clarifying modifications in the Collateral Law), there is consensus that the Reorganisation Law does not have a material adverse impact on the Enforceability Principle if care is taken when drafting enforceability provisions in security agreements governed by the Collateral Law.

Since Article 30 of the Reorganisation Law prohibits creditors from accelerating underlying debt within the context of a judicial reorganisation, the trigger allowing a security holder to enforce under agreements governed by the Collateral Law must not be limited to or merely contingent upon a prior acceleration of the underlying debt. In practice, it is already the case that enforcement under security agreements governed by the Collateral Law is permitted in circumstances of default pursuant to the underlying agreement(s) to which the security agreements relate, and the Collateral Law is clear that enforcement can proceed even if the underlying secured obligations are not due and payable at the time of enforcement.

There is consensus that the Reorganisation Law does not jeopardise the use of double Luxco structures in connection with security grants pursuant to the Collateral Law.

Despite some initial uncertainty, there now seems to be market agreement with respect to addressing minor issues arising in relation to agreements governed by the Collateral Law as a consequence of the Reorganisation Law.

Contributed by: Arnaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder

Enhanced Digitalisation of the Securities Market

In the 2020 edition of this guide, the legislative changes expected in the sphere of distributed ledger technology (DLT) under Bill No 7637 (now in force as the Blockchain II Law) were briefly discussed. Much has changed in this respect since then, which is why a chronological recap of the novelties around the Luxembourg DLT framework may be of interest.

Blockchain I Law

The Luxembourg blockchain legislation was initiated with the adoption of the Law of 1 March 2019 (the “Blockchain I Law”), which amends the Law of 1 August 2001 on the circulation of securities (the “Securities Settlement Law”). The Blockchain I Law brought about minor but important amendments to the Securities Settlement Law. By adding new Article 18a to the Securities Settlement Law, the Blockchain I Law expressly allowed account keepers (eg, credit institutions) to record the securities entrusted to them on a distributed electronic ledger and operate transfers using DLT.

The explanatory memorandum of the Bill highlights that the changes merely serve the purpose of providing legal certainty. The Luxembourg legislator thereby reinforces the principle of technological neutrality, meaning that, where no form is prescribed by law, parties are free to choose for their operations the technological process they think fit.

Blockchain II Law

While the Blockchain I Law allows for the tokenisation of securities initially issued in one of the classical forms (eg, in the form of a bearer note), the Law of 22 January 2021 (the “Blockchain II Law”) which amends, among other laws, the Law of 6 April 2013 on dematerialised securi-

ties, provides for the *native* issuance of security tokens (the “Securities Dematerialisation Law”). In alignment with the Blockchain I Law, this change occurred simply by specifying that settlement systems and central account keepers may record securities in the securities issuance account on a distributed electronic ledger. The securities issuance account differs from a straightforward securities account insofar as the securities truly come into existence through the recording on the securities issuance account (hence the term *native* issue). Securities subject to Luxembourg law may thus directly be issued on the blockchain.

CSSF White Paper on DLT

In response to the preceding legislative developments, the CSSF issued a white paper on DLT and Blockchain on 21 January 2022. The aim is to guide professionals of the financial sector in their due diligence process when deciding to resort to DLT in the context of the provision of financial services. The white paper guides those service providers through risk/benefit assessment on the use of DLT for the provision of financial services.

CSSF FAQ on UCI Administrators

On 1 June 2022 the CSSF published an FAQ on CSSF circular 22/811 on UCI Administrators (the “UCIA FAQ”). In Q1.2, the CSSF asserts that administrators of undertakings for collective investments (UCIs) who act as registrar may maintain the unit/shareholder register of UCIs using DLT. This position is not backed by any statute, but simply relies on the principle of technological neutrality. Indeed, while registered securities are legally required to be recorded on a ledger, the law is silent as to whether such ledger must be held in a centralised or decentralised manner, on paper or electronically. It should be noted, however, that registered securities

Contributed by: Arnaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder

recorded on a decentralised electronic ledger must still comply with certain legal requirements applicable to such registers. For some types of securities, the law imposes specific formalities in respect of their registration and transfer. Those formalities must be observed for the maintenance of DLT-based security registers, which may require imaginative solutions from a legal and technological perspective (see Dr S. Zoochemistry: “DLT-registered Fund Units/Shares: A Comparison between German and Luxembourg Law”, AGEFI, July 2022).

Blockchain III Law – Financial Collateral Arrangements

As for the previous blockchain laws, the amendments to the Law of 5 August 2005 on financial collateral arrangements (the “Collateral Law”) by the Law of 15 March 2023 (the “Blockchain III Law”) were of a straightforward clarificatory nature. A specification was added to the definition of “financial instruments” to expressly mention financial instruments recorded on a distributed electronic ledger. This amendment concerns only book entry securities recorded under the Blockchain I Law, and does not target registered securities recorded via DLT under a technologically neutral interpretation of the law, as per the CSSF’s UCIA FAQ. However, taking a technologically neutral approach, nothing prevents the application of the Collateral Law to security tokens qualifying as registered securities (see, also M. Tjon Akon : “Smart Pledges: creation, perfection and performance of information duties”, Lex now, Logitech, May 2018).

Blockchain IV Bill

The most recent building block of the Luxembourg legal blockchain framework is Bill No 8425, which was submitted to the parliament on 24 June 2024 (the “Blockchain IV Bill”). As opposed to the previous blockchain laws, this

goes further than providing legal certainty for options that, under a technological neutral approach, would have been possible from the outset. The Blockchain IV Bill intends to amend the Securities Dematerialisation Law to introduce the concept of a control agent. The control agent is a licensed investment firm or settlement system that has been appointed by the issuer to record native issued security tokens on a securities issuance account. The control agent is responsible for ensuring the integrity of the detention chain. The actual innovation of this law is that, by resorting to a control agent, the end user can have direct access to the DLT platform on which the native security tokens are recorded. Indeed, neither the Blockchain Law I nor the Blockchain Law II intended to break with the selective access to settlement systems and central account keepers, where the intermediation of a licensed account keeper (eg, a credit institution) remains unavoidable. If this Bill passes into law, the Luxembourg blockchain framework will come a significant step closer to deploying the full potential of DLT, namely the reduction of transaction costs through a minimisation of intermediaries.

The Luxembourg legislator has taken small but determined steps in digitising its securities market with respect to DLT. While the existing blockchain laws have added legal certainty to the use of DLT for securities transactions, the real strength of Luxembourg vests in the consequential upholding of the principle of technological neutrality by its legislative and regulatory bodies, combined with the absence of statutory requirements for paper formats and a large freedom left to parties to design contractual arrangements according to their needs. With the Blockchain IV Bill, the Luxembourg government has demonstrated its will to deploy the disruptive potential of DLT on securities transactions.

Contributed by: Arnaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder

Renewed Interest for Securitisation Vehicles

Market players are showing a renewed interest in the securitisation undertakings (SVs), taking advantage of the “flexibilisation” of the law on securitisation dated 22 March 2004, following the legal amendments adopted in 2022. In summary, such amendments lifted or alleviated various limitations and restrictions.

- Active risk management of securitised assets (directly or through appointed portfolio managers), including in consideration of short-term market variations, is allowed if: (i) the financial instruments are not offered to the public; and (ii) the securitised assets consist of debt instruments or claims.
- An SV may be financed by way of the issuance of any financial instruments (with the concept to be construed broadly, including foreign law hybrid instruments), and may also resort to borrowing to finance in part or in full the securitisation transaction, removing original restrictions and allowing such financing only on a transitional basis.
- An SV may grant security interests to a wider scope of beneficiaries (including third-party creditors) to the extent it is carried out within the context of the securitisation transaction.
- New legal forms were made available to SVs, some of which are transparent from a tax perspective and permit the issuance to investors of equity instruments without control features (that remain exclusively lodged with the general partner).

As anticipated, these amendments served the intended purpose, making the deployment and implementation of classic securitisation transactions more straightforward. Heavily negotiated structuring issues – eg, third-party loan financing features, ancillary security packages or more sophisticated frameworks for managing assets

– can now be resolved more quickly. The types of permitted and conditional active management have now broadened the list of products available for securitisation transactions.

Interestingly, the amendments also increased the appeal of the vehicles, which drew more interest from market players outside of the context of pure securitisation transactions. SV may now be seen as a versatile tool that can be used in a variety of structures. The now legally enshrined segregation of components constitutes an appealing feature that may be beneficially applied within fund structures. Each component or section represents a ring-fenced and separate pool of assets and liabilities allocated by the SV, segregated from the own assets and liabilities of the securitisation undertaking itself, and of the other compartments, offering a high level of protection to investors within the context of an insolvency scenario. The recent amendments have brought some added certainty by adding an express legal provision according to which, to the extent provided for in the organisational documents of the securitisation undertaking, where the component is financed by way of equity instruments (shares or units), the balance sheet and the profit and loss account of the component must be approved only by its investors. This feature may be combined with the comparable features of Luxembourg fund structures (eg, the sub-funds of a reserved alternative investment fund (RAIF)), making a securitisation undertaking a less cumbersome and costly alternative to separate holding companies, with enhanced leveraging capabilities.

A Robust and Diversified Fund Finance Market

The Luxembourg fund finance market has been strong and diversified over the past year. There has been a steady number of new subscription

Contributed by: Arnaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder

line facilities, along with the usual extensions, accessions and increases. In alignment with the global market, most expect a gross *uptick* in 2024.

The diversification results from the growing number of less common types of arrangements which are now also being set up in Luxembourg, namely employee loan facilities, management fee facilities, GP facilities and hybrid facilities.

The NAV market has seen growth over the first three quarters of 2024. NAV facilities have piqued the appetite of sponsors of all types and sizes, and have given non-bank lenders the opportunity to boost market share. This appears to have shown that the call for a better education of investors on the added value of such facilities, which many market participants believed was necessary, was justified.

While these instruments were formerly used within the context of sublines to circumvent obstacles to the structuring of standard security packages resulting from cross-border tax or regulatory constraints, equity commitments letters (ECLs) have become a common feature of NAV financings. Typically, ECLs document the commitments by a fund to make capital contributions to a direct or indirect subsidiary to reassure creditors that it will, at any time, be able to meet its financial obligations. While an ECL is not directly granted for the benefit of secured parties, they should be third-party beneficiaries, and security will typically be taken over the corresponding claim, allowing secured parties, in the event of a default, to step in and enforce funding obligations, preventing any amendments to the terms of the ECL without their prior consent. It is not unusual for parallel ECLs – documenting an obligation between Luxembourg funds – to be put in place, one governed by Luxembourg law

and the second governed by the law governing the facility agreement.

Another discussion that often takes place in the context of NAV facilities concerns the possible need for guarantee limitation to address local legal concerns. Wording that caps the amount payable by a guarantor by reference to its net assets may be necessary to ensure that the granting of the guarantee falls within corporate interests. NAV facilities may be implemented at various levels in a fund structure. Where a subsidiary holds the underlying assets and acts as borrower, the granting by direct or indirect parent entities of a guarantee in favour of the subsidiary borrower's creditors is most often straightforward, as guarantors will necessarily benefit from the transactions implemented at the level of their direct or indirect subsidiaries. However, the interests of guarantors in granting an upstream or a cross-stream guarantee may be questionable, and the granting of an unlimited guarantee may then be limited to the proceeds of the borrowing that will directly or indirectly benefit the guarantor (loaned or contributed to it or one of its direct or indirect subsidiaries). The guaranteeing of any surplus amount may need to be capped.

Estimates need to be made on the basis of actual scenarios, the intended use of proceeds under the facility and various other factual considerations – making it impossible to apply a one-size-fits-all solution. However, agreement can generally be reached between all parties quickly since the applicable principles are widely known across the market and various standard features may also be recycled to an extent, depending on each case.

Contributed by: Arnaud Arrecgros, Yann Hilpert, Maurice Honnen, David De Pasquale and Arina Belikova, Maples and Calder

Transposition of the CSRD

The Corporate Sustainability Reporting Directive (CSRD) (Directive (EU) 2022/2464) entered into force on 5 January 2023, and amended the Non-Financial Reporting Directive (the “NFRD”) (Directive (EU) (2014/95) by expanding its scope and broadening the corporate sustainability reporting requirements, is being currently transposed into Luxembourg law by the Bill of Law number 8370 (the “Bill”).

The CSRD, contrary to NFRD, which primarily targeted large public-interest entities with an average number of employees in excess of 500, broadens the scope of entities falling under the sustainability reporting requirements, as it is expected to cover almost 50,000 entities whereas the NFRD only covered 11,000.

Such undertakings must include in their reporting all information necessary to understand the effect of their operations on sustainability matters and how these impact the undertaking’s development, performance and position. However, according to the Bill, they may exclude commercially sensitive information from their sustainability report if disclosure could prejudice its commercial position.

Information related to sustainability must be disclosed and controlled according to the European Sustainability Reporting Standards by the statutory auditors charged with issuing an opinion on the compliance of an undertaking’s sustainability information with CSRD requirements. In case of failure, listed companies falling within the scope of the CSRD may be subject to administrative sanctions by the CSSF and criminal sanctions, and also be exposed to market and reputational risks, driving away potential investors and weakening dialogue and communication with stakeholders, given the increasing awareness and understanding of the risks and opportunities for business and investments arising from sustainability linked matters.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com