ALLEN & OVERY

Luxembourg Case Law Briefing – Corporate Law Highlights

2021 Edition

Introduction

We are very pleased to present our first Luxembourg corporate law focused case law briefing.

In this first edition, we have focused on decisions published over the last two years – some of which date back to 2018 – and which we have identified as the most relevant for our corporate practice. Topics as diverse as piercing of the corporate veil, apparent mandate theory or directors' duties and liabilities are covered, always with the purpose to inform and explain the practical scope rather than present a full academic analysis.

We believe it is essential for the Luxembourg legal community as well as international investors to gain a better understanding of key case law developments and we look forward to any feedback with a view to further improving the next editions.

We remain of course available if you wish to discuss any of the decisions in more detail.

On behalf of the Allen & Overy Luxembourg Corporate/M&A Team

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Case law summaries

Abuse of majority – Equal treatment of shareholders – Corporate interest

Luxembourg Court of Appeal, sitting in commercial matters, 13 July 2018, N°100/18, rôle n°43424

The board of directors (the **Board**) of a public limited liability company (*société anonyme*) (the **Company**) resolved to propose to the annual general meeting of shareholders the allocation of exceptional discretionary bonuses to the members of the executive committee (*comité de direction*) of the Company (the **Committee**) in connection with the approval of the annual accounts for the financial years ended 2012 and 2013. The Board was composed of individuals holding together the majority of the shares in the Company (the **Majority Shareholders**) and the Committee was composed of the Majority Shareholders and one individual that was not a shareholder of the Company. In relation to the financial year 2012, the Board proposed the allocation of a bonus only to members of the Committee who were also the Majority Shareholders, while, in relation to the financial year 2013, the Board proposed the allocation of such bonuses to all members of the Committee.

The allocation of such bonuses to the relevant members of the Committee was approved by the annual general meetings of the shareholders of the Company approving the 2012 and 2013 annual accounts (the **AGMs**).

A minority shareholder holding 24.75% of the share capital of the Company (the **Minority Shareholder**) brought a legal action against the Company requesting that the AGMs be declared void on the basis of abuse of majority, considering that the decision to allocate the bonuses favoured the Majority Shareholders disproportionately.

In the first instance, the Luxembourg District Court declared the AGMs void and the Company appealed the decision.

On appeal, the Court of Appeal first confirmed that the judge shall in principle not interfere in the management of a company or substitute its personal assessment for that of the corporate bodies. However, the intervention of the judge is justified in the event the disputed decision could be faulty and contrary to the company's corporate interest. When assessing whether a decision may be subject to an abuse of majority, the judges must however limit themselves to exercising "marginal control" and verify whether the decision in question is manifestly contrary to the corporate interest.

The Court then confirmed that the abuse of majority requires the combination of two elements:

(i) the breach of equality between shareholders of the company to the benefit of the majority shareholders; and

(ii) the relevant decision is harming the corporate interest of the company.

The Court then analysed the matter at hand in a two-steps approach.

(1) Regarding the first criterion (i.e. breach of equality between the shareholders), the Court added that the breach of equality between the shareholders may only constitute an abuse of majority to the extent the majority shareholders are acting in bad faith, i.e. the

majority shareholders are solely acting in a way that favours them to the detriment of the minority shareholders.

The Court defined equality between shareholders as being the identity of rights and obligations relating to the shares of the same class to which its holders are entitled on a pro rata basis. The equal treatment of shareholders is mainly to protect minority shareholders against the abuse of rights by the majority shareholders, through the obligation for the corporate bodies to treat shareholders equally.

In this case, the Court noted that the exceptional discretionary bonus for the 2012 financial year constituted a breach of equality as it was only allocated to the members of the executive committee who were also the Majority Shareholders and the other member of the Committee who was not a shareholder of the Company had not received such bonus. The Court concluded that the allocation of the bonus had been taken for the sole purpose of favouring the interest of the Majority Shareholders to the detriment of the Minority Shareholders.

With regard to the allocation of the bonus for the 2013 financial year, the Court considered that since all the members of the Committee had received the bonus (whether or not they were Majority Shareholders), a breach of equality between shareholders could not be established.

(2) Regarding the second criterion (i.e. violation of corporate interest), the Court confirmed that the corporate interest is specific to the company and is, as such, distinct and independent from the interests of the shareholders. The corporate interest is the common goal (*but commun*) of the company and consists in particular in maximising profits for the benefit of its shareholders, but also taking into account the interests of all other stakeholders of the company as a whole.

In the present case, the Court noted that the assessment of whether the distribution of the relevant bonuses was in the interest of the Company was to be made on the basis of the results of the Company for the 2012 and 2013 financial years.

The Court first noted that discretionary bonuses to executives of the Company shall be made in proportion to the results of the Company. For the 2012 financial year, the amount of the bonus was manifestly excessive compared to the net result achieved by the Company in such financial year and therefore contrary to the corporate interest of the Company. For the 2013 financial year, the Court noted that the Company made a higher profit than during the 2012 financial year while the amount of the bonus had been decreased. On this basis, the Court concluded that the Minority Shareholder had not brought sufficient proof that the bonus allocated to the members of the Committee in relation to such financial year was made contrary to the Company's corporate interest.

The Court therefore confirmed the cancellation of the resolution of the AGM approving the 2012 annual accounts, but rejected the annulment of the resolution of the AGM approving the 2013 annual accounts.

This Court of Appeal decision confirms the criteria for the application of the abuse of majority principle in line with established case law and shows that it can also be applied in situations where the majority shareholders are *prima facie* not acting or favoured in their capacity as shareholders. Other interesting takeaways of this decision are the definitions of the equal treatment of shareholders and the corporate interest.

Piercing the corporate veil – Holding all shares in a company is insufficient to pierce the corporate veil

Luxembourg Court of Appeal, sitting in commercial matters, 3 April 2019, N°49/19-VII-CIV, rôle n°44018

The appellant (the **Appellant**) alleged that the respondent (the **Respondent**) owed him a certain amount of money. This debt was almost 20 years old and resulted from a contract signed between the Appellant and the Respondent in which the Respondent agreed that its subsidiary, a Luxembourg company (the **Company**), which was not party to such contract, would share profits from a real estate sale with the Appellant.

The Appellant believed it had not received its share of the profits from the Company and consequently brought an action against the Company in 2013. However, the Company had been dissolved in 2006. The Appellant therefore requested that the judge pierce the corporate veil of the Company and hold the Respondent as former shareholder liable for the Appellant's claim.

The Appellant **first** argued that the court should pierce the corporate veil of the Company on the basis that the Company was a fictitious company, a wholly owned subsidiary behind which the Respondent was abusively hiding so he could get out of paying the profits owed.

The Appellant's **second** argument was based on the parties' contractual relations – he alleged that the Respondent had made a *promesse de porte-fort*, i.e. had undertaken to ensure that the third party, the Company, performed its obligations, and as no payment had been made, the respondent had the contractual obligation to cover for the payment.

The court of first instance dismissed both of the Appellant's pleas. The Appellant then appealed that decision on the same grounds as set out above.

The Court of Appeal also dismissed the Appellant's claim on the following grounds:

- on the first argument regarding piercing the corporate veil, the court refused to pierce the corporate veil on the basis that the Appellant had not brought sufficient circumstantial evidence (*faisceau d'indices*) to prove an abuse of rights (*abus de droit*) on the part of the respondent. Specifically, there was no evidence demonstrating intermingling (or confusion) between the Company and its shareholder. Indeed, the Court of Appeals held that being the sole shareholder of a company is not in itself sufficient to pierce the corporate veil.

- on the second argument regarding the *promesse de port-fort*, the court found that the parties to the contract, i.e., Appellant and Respondent, had signed the contract in their own names, and in the case of the Respondent, had not signed the contract as shareholder or representative of the Company. As a result, the Respondent's signature was not meant as a guarantee for the Company's payment, but rather the Respondent only had a personal obligation to make the Company pay. It was an *obligation de faire*, and the Respondent could only be liable for damages (and not the full amount of profits due) if the Company had not paid the promised part of the profits.

Finally, it was demonstrated that the Appellant had actually received his part of the profits from the Company years before, so no damages were awarded.

Though the Court did not directly assess the conditions for piercing the corporate veil as the theory was not applicable to the matter at hand, the Court did reiterate the principle that the fact of being the sole shareholder of a company is not sufficient to pierce the corporate veil.

This decision does provide further confirmation that courts may only pierce the corporate veil if the abuse of right is clear and obvious. The shareholder(s) must have completely absorbed its/their subsidiary, in such a way that the subsidiary has no separate economic and legal existence. In their assessment, courts may, on a case-by-case basis, take into account various factors as indications that a company is a fictitious company, such as:

– intermingling (*confusion*) between the assets of the subsidiary and the assets of the shareholder(s) without adequate documentation;

– important decisions regarding the company's affairs are generally taken by the shareholder(s) and not by the management body at formal meetings; and

– the company is under-capitalised.

In this context, it should be noted that some legal commentators have considered a recent decision by the Luxembourg district court dated 15 May 2019 as a possible new exception to the corporate veil doctrine. The decision in question was however taken in a very particular factual context and it is in our view not appropriate to consider it as a change in existing case law.

Indeed, such decision involved third-party attachment proceedings and fraudulent behaviour. More specifically, the shareholder companies whose corporate veil was pierced had been instrumental and active players in the commission of two criminal offences, notably, fraud and misappropriation of corporate assets. The corporate veil doctrine is meant to protect shareholders from debt incurred by their subsidiaries, and the corporate veil is not applicable in relation with criminal offences such as misappropriation of corporate assets and generally the corporate veil cannot protect against fraudulent actions in line with the principle *fraus omnia corrumpit*.

As such, there is in our view no change or extension of the corporate veil doctrine under current Luxembourg case law to be inferred from this decision.

Apparent mandate theory – Limited application – Obligation to independently verify representation power

Luxembourg Court of Appeal, sitting in commercial matters, 30 May 2019, N°69/18, rôle n°44684

A German company (the **Seller**) brought a legal claim against a Luxembourg private limited liability company (*société à responsabilité limitée*) (**Luxco**) requesting the payment for certain computer equipment pursuant to a purchase order signed by one manager of Luxco.

Luxco claimed that it was not bound by the purchase order since only one manager had signed it, whereas its articles of association provided that Luxco was only validly bound towards third parties by the joint signature of two managers.

The Seller argued that the apparent mandate theory applied to the extent that the purchase order was made on Luxco's letterhead and signed by a person indicating that it was acting in its capacity as "directeur" of Luxco. The Seller further claimed that the purchase order was made at the end of the year, in a very busy period. Therefore, the Seller had (in its mind) legitimately believed that the person who signed the purchase order had the authority to bind Luxco.

In the first instance, the Luxembourg District Court accepted the Seller's request on the basis of the apparent mandate theory and ordered Luxco to pay the amount due under the purchase order as well as the default interest.

Luxco appealed the first instance decision and the Luxembourg Court of Appeal overturned the judgment.

The Court stated that for the apparent mandate theory to apply, the third party invoking it must have legitimately believed that the person with whom it was contracting had the power to represent its co-contractor. The judge must assess the legitimacy of the third party's belief in the powers of the person with whom it has contracted. The Court further confirmed that the apparent mandate theory may only be applied when specific circumstances allowed the third party to not verify the powers of the counterparty.

The Court then analysed these principles in the context of Luxembourg corporate law. According to article 710-15 (1) subparagraph 4 of the Luxembourg law of 10 August 1915 on commercial companies as amended (the **1915 Law**)[1], the clause in the articles of association giving the capacity to one or more managers to represent the company shall be enforceable against third parties if it has been duly published in the Luxembourg official gazette. This provision aims to protect third parties dealing with a company, since third parties may rely on the publication of the appointment of the corporate bodies of the company, without the company being able to invoke any irregularities in relation to the relevant appointment.

On the other hand, a company which has regularly published the allocation of representation powers of the company and has duly filed its articles of association with the Luxembourg trade and companies register (*Registre de commerce et des sociétés*) must be able to rely on such publication vis-à-vis third parties, without the latter being able to oppose its legitimate belief in the powers of any other persons.

Consequently, where a third party deals with a company without verifying the allocation of representation powers of such company, the risk of such negligence must lie with the third party and it cannot invoke the apparent mandate theory to remedy its risk. In the matter at hand, the fact that the sale was made electronically, in a busy period at the end of the year, was not relevant.

On this basis, the Court concluded that the Seller had to verify the representation powers of Luxco. To the extent only one manager of Luxco signed the

[1] Please note that this definition shall apply throughout the entire document.

purchase order, no contract was concluded between the Seller and Luxco, and Luxco was not bound by the purchase order.

This Court of Appeal decision significantly decreases the applicability of the apparent mandate theory in Luxembourg corporate law and underlines the importance of checking the representation power of any Luxembourg company one is dealing with (by verifying the articles of association and the board composition based on a corporate excerpt of the company).

Violation of articles of association – Annulment of resolutions of the board of directors in breach of the articles of association – Liability of the members of the board of directors – Impact on validity of transaction

Luxembourg District Court, sitting in civil matters, 17 October 2019, N°2019TALCH20/00009, role n°164577

The articles of association (the **Articles**) of a Luxembourg public limited liability company (*société anonyme*) (the **Company**) contained a provision relating to "reserved matters" (article 8 of the Articles). According to article 8, a favourable vote of at least 75% of the total votes relating to all of the issued voting shares of the Company was required for the adoption of any resolution relating to any of the "reserved matters", including in particular relating to transfer of assets of the Company. This provision was introduced in 2007 at the request of a minority shareholder of the Company holding 26.40% of the share capital of the Company (the **Minority Shareholder**).

In 2013, the board of directors of the Company (the **Board**) decided to exchange the shares held by the Company in a subsidiary for shares in another company (the **Transaction**). Considering that the Transaction fell within the scope of article 8 of the Articles, the Minority Shareholder brought a claim against the Company and the members of the Board, requesting the District Court to, *inter alia*, declare the relevant resolutions of the Board approving the Transaction null and void, order the members of the Board to pay damages and cancel the Transaction.

On the request for nullification of the resolution of the board of directors

The Luxembourg District Court considered that the Transaction was to be deemed a "reserved matter" within the meaning of article 8 of the Articles and that it should have been submitted to the vote of the general meeting of shareholders of the Company. In approving the Transaction by a resolution of the Board, the directors violated article 8 of the Articles.

The District Court then ruled that where a resolution of the board of directors of a company is taken in breach of the articles of association, the annulment of such resolution may be requested by an individual shareholder.

Considering that there had been a violation of the Articles, the District Court decided to cancel the resolution of the Board approving the Transaction.

On the claim for damages

The Minority Shareholder based its claim for damages on the loss of the capital invested by the Minority Shareholder in the Company.

The District Court first noted that the Minority Shareholder took an individual action (as opposed to an *action sociale*) to act for its own benefit against the directors of the Company. The District Court confirmed that under Luxembourg law, such individual action requires a personal and direct damage to the relevant shareholder, which must be distinct from the damage suffered by the company. The District Court concluded that the reduction of the company's assets cannot constitute a personal and direct damage suffered by an individual shareholder.

The District Court then specified that the criterion for distinguishing the damage of the company from the personal reparable damage of an individual shareholder consists in the fact that the latter directly affects the value of the shares or the shareholder's assets without affecting the company's assets. The individual loss must not constitute a mere repercussion of the corporate loss and must, therefore, be disconnected from a loss which would affect the company's assets.

The District Court concluded that the damage invoked by the Minority Shareholder, i.e. the loss of the capital invested, constituted a mere repercussion of the damage suffered by the Company that was not disconnected from the loss affecting the corporate assets.

Based on the above, the District Court ruled the claim for damages against the members of the Board inadmissible (*irrecevable*).

On the request for nullification of the Transaction

The District Court considered that the limitations set out in the articles of association of a company have a purely internal effect and that third parties cannot invoke them. Further, in accordance with law, the corporate bodies validly represent the company towards third parties in all legal transactions, regardless of any limitations set out in the articles of association, which have a purely internal effect.

The District Court considered that the Minority Shareholder had to be considered as a third party in relation to both the Company and the Transaction, since it was not a party to the Transaction.

On this basis, the District Court rejected the request for annulment of the Transaction.

This District Court decision clarifies and confirms a number of key points:

- A shareholder may only sue a board of directors ”individually” (outside the framework of the *action sociale*) for an “individual” damage different from the mere loss of value of the company.
- A breach of the articles of association is a potential cause of nullity for resolutions of the board of directors (provided, however, that while not discussed in this decision, any such nullity needs to be assessed in light of the general principles applying to requests for nullification).
- Clauses limiting the power of a board of directors are not binding on third parties and cannot be invoked by them.

Bearer shares - Non-immobilisation of bearer shares within the time limit set by law – No automatic dissolution but ability to request a dissolution

Luxembourg Court of Appeal, sitting in commercial matters, 13 November 2019, N°149/19 IV-COM, rôle n°CAL-2019-00289

The sole shareholder (the **Sole Shareholder**) of a Luxembourg public limited liability company (*société anonyme*) (the **Company**) was the holder of all of the bearer shares (the **Shares**) issued by the Company, representing the entire issued share capital of the Company. The Shares were seized by the Swiss tax authorities on 28 January 2015. In accordance with the law of 28 July 2014 on the immobilisation of bearer shares and units (the **2014 Law**), the Shares should have been immobilised with a depositary appointed by the management body of the Company within 18 months after the entry into force of the 2014 Law, i.e. by 18 February 2016 at the latest. This had not been done (probably due to the seizure of the bearer certificates by the Swiss tax authorities). Therefore, in application of the 2014 Law, the voting rights attached to the Shares were suspended and the Shares were to be cancelled: a capital reduction of a corresponding amount was to be carried out.

Considering that all of the Company's shares were bearer shares with suspended voting rights, it was impossible to hold a general meeting of the shareholders of the Company in order to validly decide on the capital reduction or take any other actions (e.g., issuing new shares) to remedy the situation.

As a consequence thereof, the Sole Shareholder brought a legal claim against the Company claiming that the Shares had been automatically cancelled by operation of law and requested the judge to order the Company to allocate them the equivalent value of the Shares, i.e. a real estate asset held by the Company.

In the first instance, the Luxembourg District Court declared the claim unfounded on the grounds that, pursuant to the 2014 Law, the cancellation of bearer securities that have not been immobilised within the statutory period is neither automatic nor passive, but rather requires active steps to be taken by the company.

The Sole Shareholder and the Company appealed the first instance decision, but the Court of Appeal confirmed the decision of the Luxembourg District Court.

The Court first noted that the 2014 Law did not anticipate any such blocking situation. The Court then analysed the preparatory work for the 2014 Law, where the legislator had indicated that the existing provisions of 1915 Law would be applicable in such a blocking situation and therefore no specific provisions were to be introduced.

The Court therefore decided to refer to the existing legislative arsenal rather than ordering the automatic allocation of the Company's assets to the Sole Shareholder, as such operation is not provided for in the 1915 Law.

The Court then noted two potential solutions in line with the 1915 Law that are proposed by Luxembourg legal doctrine. The first is to denounce the situation to the public prosecutor who could initiate an action for dissolution of the company pursuant to article 1200-1 of the 1915 Law. Alternatively, the management body could initiate a civil action for dissolution of the company "for just reasons" ("*pour de justes motifs*") on the basis of article 480-1 of the 1915 Law.

The Court concluded that the Company was not deprived of alternatives and therefore confirmed the first instance decision by declaring the claim of the Sole Shareholder unfounded.

Beyond the specific situation under the 2014 Law, this Court of Appeal decision provides useful guidance for other remedies where there is a structural blocking situation and confirms that judicial dissolution is among the available solutions.

Register of beneficial owners – CJEU preliminary ruling request on the concepts of "exceptional circumstances", "risk" and "disproportionate" risk

Luxembourg District Court, Ordonnance, 24 January 2020, N°1140853, TAL-2019-10130, Case C-37/20

The Luxembourg register of beneficial owners (*Registre des bénéficiaires effectifs, the* **RBO**) had refused a request made by the beneficial owner of certain companies to limit access to his personal information only to national authorities.

According to article 15, paragraph 1 of the law of 13 January 2019 establishing a register of beneficial owners (the **RBO Law**), a beneficial owner may request the manager of the RBO to limit access to his personal information in exceptional circumstances, i.e. where such access would expose the beneficial owner to "a disproportionate risk, a risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation". Such limitation may only be granted for as long as the given circumstances so justify and up to three years.

When the restriction of access is granted, only national authorities, credit and financial institutions as well as bailiffs and notaries acting in their capacity as public officers may have access to information on the beneficial owner.

In the event of refusal for restricted access by the RBO, any interested party may submit an appeal within a period of 15 days. In the present case, the beneficial owner asked the Luxembourg District Court to overrule the decision of the manager of the RBO.

The Luxembourg District Court therefore had to determine whether the conditions of article 15 of the RBO Law were met. Noting that the relevant provision of the RBO Law gives rise to a number of questions of interpretation, the Luxembourg District Court decided to refer the matter to the European Court of Justice (the **CJEU**) for a preliminary ruling.

The following questions were addressed to the CJEU:

The notion of "exceptional circumstances"

According to article 15, paragraph 1 of the RBO Law, a restriction of access may be granted if the beneficial owner can justify "exceptional circumstances". This provision is a transposition of article 30 of the amended directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing (the **AML Directive**).

According to article 30 of the AML Directive, the concept of "exceptional circumstances" has to be defined under national law. However, the Luxembourg legislator merely refers to the concepts of "a disproportionate risk, a risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation", which already constitute a condition for the application of the limitation of access under article 30 of the AML Directive. The Luxembourg District Court therefore asked the CJEU whether article 30 of the AML Directive authorises national law to define the concept of "exceptional circumstances" in this way.

The notion of “risk”

The Luxembourg District Court highlighted the vagueness of article 30 of the AML Directive with regard to the concept of “risk”. More specifically, the District Court enquired whether the terms “a disproportionate risk, a risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation” should be read as referring to a set of eight cases, the first of which would correspond to a general risk subject to the condition of disproportion and the following seven to specific risks exempted from the condition of disproportion, or as referring to a set of seven cases, each of which corresponds to a specific risk subject to the condition of disproportion.

The notion of “disproportionate” risk

The third question referred to the CJEU is on the notion of “disproportionate” risk and in particular, the divergent interests to be taken into account for the application of article 30 of the AML Directive.

The response of the CJEU is keenly awaited as it will clarify the conditions under which it is possible to benefit from the exemption provided for by article 15 of the RBO Law, which should be of interest to a certain number of individuals.

Judicial dissolution of a company for just reasons – Serious disagreement between shareholders compromising the functioning of the company – Appointment of a provisional administrator (conditions)

Luxembourg Court of Appeal, sitting in commercial matters, 9 July 2020, N°90/20-IX_COM, role n° CAL-2019-00513

In 2008, **shareholder A** and **shareholder B** purchased respectively half of the shares of a Luxembourg private limited liability company (*société à responsabilité limitée*) (the **Company**) and also became managers of such Company. In accordance with its articles of association, the Company was validly represented towards third parties by the joint signatures of both managers. Due to a serious disagreement between both shareholders, no corporate actions had been taken for several years. The shareholders also failed to agree on the liquidation of the Company or on a sale of the shares/ assets of the Company. Furthermore, there was no indication of a potential successful resolution of the situation in the future.

As a consequence thereof, shareholder B brought a legal claim requesting the judicial dissolution of the Company on the basis of a serious disagreement between both shareholders.

In the first instance, the Luxembourg District Court declared shareholder B's request well founded and ordered the judicial dissolution of the Company. Shareholder A appealed such decision and requested the appointment of a provisional administrator as well as an expert in order to evaluate the shares of the Company.

On appeal, the Court of Appeal confirmed that according to article 1871 of the Civil Code and article 710-3 of 1915 Law, the judicial dissolution of a company may be pronounced by the judge, at the request of a shareholder, for just reasons (*justes motifs*).

The Court then defined the term "just reasons" for a judicial dissolution combining two cumulative criteria:

- there must be a serious disagreement between shareholders; and
- such disagreement must jeopardise the normal functioning of the company.

A *contrario*, a judicial dissolution cannot be obtained if a company's existence is not completely jeopardised, despite certain disagreements among the shareholders.

The Court further pointed out that it is irrelevant, and not required to be determined, which shareholder is at the root of a potential judicial dissolution of the company.

With respect to the request for the appointment of a provisional administrator, the Court stated that the appointment of a provisional administrator requires exceptional circumstances when there is a crisis situation resulting in a paralysed decision-making process; provided however that there shall be an opportunity to pursue the recovery of the company in order to preserve the rights of its stakeholders. The Court concluded that in the present case there was an irremediable conflict situation within the company, definitively compromising any chance of resuming normal business life, and therefore no reason to appoint a provisional administrator.

The Court also rejected the request for the appointment of an expert for the valuation of the Company's shares in view of the nature and seriousness of the disagreement and failure by shareholder A to establish that the Company's articles of association would allow recourse to such a solution.

Considering that the conditions for judicial dissolution were met, the Court confirmed the Luxembourg District Court's first instance decision to dissolve the company.

This Court of Appeal decision confirms the criteria for a judicial dissolution of a company for just reasons and in particular the principle that this remedy is a last resort solution in the event of a permanent and irremediable deadlock jeopardising the normal functions of the company.

Transfer of shares – Means of proof – Enforceability – Transfer of shares that have not been fully paid up

Luxembourg Court of Appeal, sitting in commercial matters, 14 July 2020, N°106/20 IV-COM, rôle n° CAL-2020-00206

Two persons (referred to as **Shareholder A** and **Shareholder B**) incorporated a Luxembourg public limited liability company (*société anonyme*) (the **Company**) in 2010 and had subscribed to all of the shares of the Company, while paying up only 25% of the subscription price. In 2011, Shareholder B transferred all of his shares in the Company to Shareholder A.

In 2018, the Company was declared bankrupt and the bankruptcy receiver ordered Shareholder A and Shareholder B to fully pay up the outstanding unpaid share capital. Shareholder B claimed that it was no longer a shareholder of the Company since 2011 and therefore no longer had any obligation to pay up the outstanding unpaid share capital.

In the first instance, the Luxembourg District Court ordered both shareholders to pay up the unpaid share capital on the ground that the transfer of shares was not enforceable against the bankruptcy receiver (or any other third party) as the relevant share transfer had not been published in the Luxembourg official gazette. The Luxembourg District Court considered that a transfer of shares that have not been fully paid up is effective between the parties upon their signature of the declaration of transfer in the share register before publication, whereas it is only enforceable against third parties once it has been duly published. The judge further ruled that the entry in the share register is only enforceable towards the company, not third parties. Since no publication had been made, the transfer was not enforceable against the bankruptcy receiver, who was to be considered as a third party in the present case. Shareholder B then appealed the Luxembourg District Court decision.

The Luxembourg Court of Appeal confirmed the verdict of the Luxembourg District Court.

The Court confirmed that, once a transfer of shares has been entered into the share register, the person whose name appears in the share register is presumed to be the sole owner of the shares registered in its name, but such entry in the share register is not conclusive evidence of ownership as the presumption can be reversed.

Contrary to what the Luxembourg District Court had ruled, the Court of Appeal confirmed that entries in the share register are enforceable both against the Company and against third parties.

The Court then pointed out that there is a specific regime in the event of a transfer of shares that are not fully paid up. According to article 430-13 of the 1915 Law, the transferee of shares that are not fully paid up is released from its obligation to pay up such shares (i) towards the company, as from the date of the valid share transfer and (ii) towards third parties, as from the date of the transfer publication.

Such publication is made in accordance with article 430-12 of the 1915 Law, i.e. by an annual publication of the situation of the share capital as part of the annual accounts, including the number of shares subscribed for, the indication of payments made, the list of shareholders who have not yet paid up their shares and an indication of the sums they owe.

In the present case, such publication was never made nor any other publication allowing the identification of shareholders who had not yet fully paid up their shares.

The Court concluded that the transfer of the not fully paid-up shares was not enforceable towards third parties and did not release the seller from its obligations towards third parties, including the bankruptcy receiver.

This Court of Appeal decision clarifies the conditions for the enforceability towards third parties of transfer of shares that are not fully paid up, in application of the 1915 Law. Further, this decision more generally confirmed that the entry in the share register does not as such constitute conclusive title of ownership but "merely" creates a reversible ownership presumption.

Failure to register the beneficial owner in the register of beneficial owners

Diekirch District Court, sitting in criminal matters, 16 July 2020, N°328/2020, Not. 1363/20/XD

A Luxembourg public limited liability company (société anonyme) (the **Company**) had not filed its annual accounts with the Luxembourg trade and companies register (*Registre de commerce et des sociétés*) since 2010 and had not had a registered office since 2013.

In January 2020, following information received by the Luxembourg trade and companies register (*Registre de commerce et des sociétés*) (the **Register**), the public prosecutor (*procureur d'Etat*) decided to request the Diekirch District Court to pronounce the judicial dissolution and order the liquidation of the Company for serious breach of the provisions of the 1915 Law pursuant to article 1200-1 of the 1915 Law.

In March 2020, public authorities noted that the Company had also failed to register its beneficial owner(s) in the register of beneficial owners (the **RBO Register**) in violation of the law of 13 January 2019 establishing a register of beneficial owners (the **RBO Law**). The RBO Law provides for criminal fines ranging from EUR 1,250 to EUR 1,250,000 for entities that fail to register the beneficial owner(s) in a timely manner.

At the end of April 2020, the Register confirmed to the public prosecutor's office that the Company had in the meantime filed the financial statements for the financial years 2011 to 2019 (inclusive), indicated its registered office and registered its beneficial owner(s) in the RBO Register.

Taking into account the efforts made to regularise the situation, the public prosecutor's office (*parquet*) decided (i) not to prosecute the directors for violation of article 1500-2 of the 1915 Law (failure to publish the annual accounts) and (ii) to abandon the proceedings for judicial dissolution of the Company.

However, the public prosecutor's office maintained the request to fine the Company for violation of the RBO Law and decided to conclude a settlement with the Company (the **Settlement**) in accordance with the law of 24 February 2015 on judgment by agreement (*jugement sur accord*), which allows the public prosecutor's office and the prosecuted person to negotiate an agreement on the criminal sanction to be applied. Such an agreement has to be validated by the court after having been established.

The Settlement stated that the breach by the Company of the RBO Law was serious as it had taken more than six months to register the beneficial owner(s) on the RBO Register, but, given that the situation had been regularised by 1 April 2020, the parties agreed to a fine for the Company in an amount of EUR 2,500.

The Diekirch District Court validated the Settlement and ordered the company to pay the agreed fine of EUR 2,500.

This District Court decision is an interesting illustration of the public prosecutor's approach to late RBO Register filings. It provides a rather reassuring confirmation that even in the event of serious breaches, the public prosecutor is willing to settle for relatively limited amounts (albeit as part of a criminal fine).

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