A&O SHEARMAN

Luxembourg Case Law Briefing – Corporate Law Highlights

2025 EDITION

We are very pleased to present the fifth edition of our Luxembourg corporate law-focused case law briefing.

In this edition, we are focusing on the 2024 calendar year rulings we identified to be the most relevant for actors navigating the corporate sector. Subject matter includes, among other topics:

- the validity of share transfers, even if not recorded in the shareholders' register;
- the importance of clarity in drafting articles of association concerning the classification of employee resignations as "good leaver" or "bad leaver" events;
- the financial condemnation of directors for gross negligence contributing to a company's bankruptcy; and
- the effects of merger-absorption on legal proceedings.

We intend to inform the reader on the practical relevance of these cases, rather than present a full academic analysis.

We believe it is crucial for the Luxembourg legal community, as well as international investors, to gain a thorough understanding of key case law developments, and we welcome any feedback, which we will aim to implement in future editions.

We remain at your disposal if you wish to discuss any of the decisions in further detail.

On behalf of the A&O Shearman Luxembourg Corporate/M&A Team

Contents

1. Transfer of shares – Recording the transfer in the shareholders' register is not a legal condition to the transfer

Luxembourg Court of Appeal, 9 January 2024, no 4/24 IV-COM, role number CAL-2023-00474

The case relates to a dispute between two shareholders of a Luxembourg public limited liability company (*société anonyme*) (the **Company**) concerning a sale of shares. One of the shareholders, the Buyer, held 50% of the Company's shares and the other, the **Seller**, held the remaining 50%. In July 2019, the two shareholders entered into a share purchase and transfer agreement (the **SPA**), providing that the Seller agreed to sell to the Buyer all the shares it held in the Company and the Buyer agreed to acquire these shares for a price of EUR15,500 (the **Price**). After signing the SPA, the Seller sent several emails to the Buyer to request the payment of the Price. Despite these repeated requests, the Buyer refused to pay the Price.

The Seller sued the Buyer before the Luxembourg District Court to obtain payment of the Price. The Luxembourg District Court declared the claim well-founded and ordered the Buyer to pay the Price. The Buyer appealed against this judgment, noting the absence of registration of the transfer in the Company's shareholders' register, the absence of contractual stipulations regarding the timing of the payment of the Price, the delay with which the Seller had claimed payment of the Price and the absence of formal notice sent by the Seller to the Buyer to perform its obligations under the SPA.

The Luxembourg Court of Appeal confirmed the judgment of the Luxembourg District Court. It recalled that since the sale is a consensual contract, it is perfected as soon as the parties are in agreement, as recorded by the entering the SPA, at which time the Seller has to transfer the shares and the Buyer has to pay the Price. It also recalled that although under article 430-4 of the Luxembourg law of 10 August 1915 on commercial companies, as amended (the **1915 Law**)[1], the ownership of registered shares is established by recording an entry in the register of registered shares, this entry is only a means of evidencing the ownership of the shares (rendering it opposable toward the Company and third parties), between shareholders, the transfer is perfected only by the exchange of consent (*solo consensu*), in accordance with article 1583 of the Civil Code. Therefore, the Court of Appeal concluded that the fact that the SPA provided that the transfer had to be recorded in the shareholders' register does not constitute a condition to the transfer but merely reiterates the provisions of article 430-4 of the 1915 Law.

The Luxembourg Court of Appeal also recalled that if the SPA does not provide for a specific timing when the payment must be made, the payment of the Price must be made at the same time of the transfer itself, the price being a determining factor of the SPA. The mere absence of an indication of a bank account or a date for payment under the SPA shall not be construed as the absence of an agreed price between the parties.

Furthermore, the Luxembourg Court of Appeal noted that at no time did the Buyer contest the existence of the transfer of the shares to its benefit, nor did it contest its obligation to pay the Price. The Luxembourg Court of Appeal concluded that the argument based on tardiness of the payment requests was unfounded. The argument based on the lack of formal notice was also deemed unfounded, as the legal action before the courts itself constituted formal notice.

This ruling confirms existing case law on the transfer of shares. It reaffirms that entry in the register of registered shares is not a condition for the validity of the transfer between shareholders, but only a means of

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

evidencing the ownership of the shares. Moreover, it recalls that the legal action can served as formal notice for payment.

2. Transfer of shares in a private limited liability company Possibility to waive by way of settlement the right to contest a transfer in breach of article 710-12 of the 1915 Law

Luxembourg District Court, 12 January 2024, no 2024TALCH11/00013, role number TAL-2023-00297

The case relates to a dispute over the validity of two transfers of shares in a Luxembourg private limited liability company (*société à responsabilité limitée*) (the **Company**). The Company was incorporated in 2016 with a share capital of EUR12,000, divided into 100 shares of EUR120 each, each shareholders holding 50 shares.

In January 2017, one of the shareholders (the **Seller**) transferred its 50 shares to a third party (the **Buyer**) for a price of EUR6,000.

On 25 July 2018, the remaining shareholder (the **Shareholder**) transferred its 50 shares to the Buyer and on the same day, the Buyer and the Shareholder met in the context of an extraordinary general meeting passed before a Luxembourg notary (the **EGM**) to approve such transfer.

The Shareholder subsequently challenged the validity of both transfers and the EGM. He contested the first transfer of shares, claiming that it had not been approved in a general meeting of the shareholders, as required by article 710-12 of the 1915 Law and article 7 of the Company's articles of association. On this basis, he further alleged that the Buyer had never validly acquired the status of shareholder and was therefore not entitled to participate in the EGM, which approved the second transfer. Consequently, he sought the annulment of the second transfer as well, alleging that the EGM was irregular and that the transfer lacked valid approval.

The Seller and the Shareholder entered into a settlement agreement on 25 July 2018 to end all disputes between them, including those related to the transfer of shares dated 11 January 2017. The Shareholder subsequently challenged the validity of the settlement agreement arguing that the provisions of article 710-12 of the 1915 Law are of public order and no settlement agreement can cure the lack of approval of a transfer in accordance with article 710-12 of the 1915 Law.

The Luxembourg District Court judged both transfers valid and ordered the Shareholder to pay procedural indemnities for the costs and expenses of the proceedings. The Luxembourg District Court analysed the two transfers separately.

- Transfer dated 11 January 2017

The Luxembourg District Court recalled that under article 710-12 of the 1915 Law, the shares of a S.à r.l. cannot be transferred without the approval of the shareholders representing at least three-quarters of the shares. Article 710-17 also provides that decisions of the shareholders must be made in a general meeting, unless the number of shareholders is less than 60, in which case decisions can be made in writing.

In this case, the transfer was not approved at a general meeting of shareholders or subject to a written vote by the shareholders.

The Court then recalled that a settlement is defined under article 2044 of the Civil Code as a contract between the parties under which they agree, through mutual concessions, to end a dispute that has arisen or may arise.

The Seller and the Buyer claimed that by entering the settlement agreement, the Shareholder expressly renounced to its right to challenge the validity of the transfer as a result of the absence of approval by a general

meeting of the shareholders, as required by article 710-12 of the 1915 Law. The Shareholder opposed this argument by replying that article 710-12 of the 1915 Law is a public order provision and that it was not possible to circumvent it by signing a settlement agreement.

The Luxembourg District Court recalled that the prior approval required by article 710-12 of the 1915 Law is an essential condition required to transfer shares of a Luxembourg S.à r.l. to a third party. The Court based its decision on interpretations made by several authors on an identical provision of the French Commercial Code and considered that the provisions of article 710-12 of the 1915 Law are of public order in the sense that the provisions of the articles of association of the company cannot derogate from them but the nullity resulting from the non-compliance with the provision of article 710-12 is a relative nullity, which can be waived by a shareholder. The judge concluded that the Shareholder waived its right to contest the transfer of shares dated 11 January 2017 by entering into the settlement agreement. Consequently, the request for annulment of the transfer was declared inadmissible.

- Transfer dated 25 July 2018

The request for annulment of the transfer dated 11 January 2017 having been declared inadmissible, the Luxembourg District Court judged that the Buyer was indeed a shareholder since 11 January 2017 and could therefore participate in the EGM, during which the Shareholder and the Buyer approved the transfer of the Shareholder's 50 shares to the Buyer. This second request for annulment was therefore declared unfounded.

This judgment reaffirms the imperative nature of the legal provisions regarding the approval by the shareholders of transfers of shares in a S.à r.l. per article 710-12 of the 1915 Law, while emphasising that the nullity resulting from non-compliance with these provisions is relative and may be regularised at a later date. It also highlights the effect of settlements, confirming that parties to a settlement agreement can waive their rights to challenge certain actions, even if these actions are tainted with irregularities. It thus strengthens the legal certainty of share transfers, while protecting parties against unfounded subsequent disputes.

3. Resignation of an employee – "Good leaver" or "bad leaver" event, importance of clarity in drafting these provisions

Luxembourg District Court, 26 January 2024, no 2024TALCH02/00153, role number TAL-2021-08378

The case relates to a dispute between a Luxembourg public limited liability company (*société anonyme*) (the **Company**) and a former employee of a subsidiary of the Company (respectively, the **Employee** and the **Subsidiary**) on the question as to whether the Employee's resignation from his employment position as "sales trader" of the Subsidiary was to be construed as a "good leaver event" or a "bad leaver event", with such classification determining the buyback price of the shares held by the Employee in the Company.

Since 2010, the Employee worked as a "sales trader" under an employment agreement with the Subsidiary and benefited from a group incentive plan resulting in the Employee holding 1,711 shares in the Company. In 2021, he resigned from his employment position and requested an evaluation of the buyback price of his shares. The Company considered his resignation from his employment agreement as a "bad leaver event" and offered to buy back his shares at a price of EUR22.19 per share. The Employee argued that his resignation should be considered as a "good leaver event" and requested an evaluation of his shares based on this classification, for a price of either EUR298.87 or EUR279.30 per share. The Employee brought the matter before the Luxembourg District Court.

The Company's articles of association were ambiguous on the classification of a resignation from an employment agreement as a "good leaver event" or a "bad leaver event":

- a "good leaver event" includes the disability, the incapacity, the death, the retirement, or the termination of the employment contract for any reason other than gross negligence or serious misconduct, and

- a "bad leaver event" is defined as any termination of the employment contract that does not constitute a "good leaver event".

The parties had divergent interpretations of the term "termination". The Employee considered that this shall include any form of cessation of the employment relationship, thus including resignation and the classification of a "good leaver event", while the Company argued that it only referred to the dismissal of the employee, with only dismissal for reasons other than gross or serious misconduct, leading to consider the resignation as a "bad leaver event".

The Luxembourg District Court concluded that there is no evidence that the intent of the parties was to exclude the resignation of an employment agreement from a "good leaver event", and as a result, the Employee's resignation should be construed as a "good leaver event" with the price for the buyback of the shares to be assessed on that basis.

It should be noted that the Employee's request to force the Company to immediately buy back his shares was rejected on the grounds that in accordance with the Company's articles of association, the Company has a discretionary right to decide the timing of such buy back.

This judgment highlights the crucial importance of precision in drafting leaver provisions to avoid divergent interpretations and costly disputes.

4. Voluntary liquidation of a company – Unsettled debts of the liquidated company transferred to the sole shareholder

Luxembourg District Court, 14 February 2024, no 2024TALCH08/00033, role number TAL-2022-07892

Luxembourg public limited liability company (*société anonyme*) (the **Plaintiff**) entered into a service agreement with another company (the **Company**) and its representative (the **Defendant**) in 2019, under which the Plaintiff agreed to assist the Company and the Defendant with the voluntary liquidation of the Company and its parent company (the **Parent Company**), the latter being wholly owned by the Defendant. In return for the services rendered, the Plaintiff issued two invoices in 2021 addressed to the Company, which remained unpaid, triggering the dispute.

The Plaintiff argued that the Defendant, as the sole shareholder of the Parent Company, should assume the debts of the Company which have been transferred to the Parent Company and in turn, to him when the Parent Company was dissolved. The Defendant contested this claim on the grounds that he had transferred his shares to a third party before the respective liquidation of the companies and was therefore not responsible for the companies' debts.

The Luxembourg District Court recalled that:

- based on the minutes of the general meeting of the sole shareholder of the Company, dated 29 December 2020, its sole shareholder, the Parent Company, decided to close the liquidation in accordance with article 1100-15 of the 1915 Law, discharge the liquidator and transfer all claims and debts, known or unknown, of the Company to the Parent Company. Therefore, the Parent Company was liable for the payment of the Company's debts.

- based on the minutes of the general meeting of the sole shareholder of the Company, dated 31 December 2020, its sole shareholder, the Defendant, decided to close the liquidation in accordance with article 1100-15 of the 1915 Law, discharge the liquidator and transfer all claims and debts, known or unknown, of the Parent Company to the Defendant. Therefore, the Defendant was liable for the payment of the Company's debts and the payment of the invoices.

The Luxembourg District Court considered that as a result of the resolutions taken on 29 December 2020 and 31 December 2020 transferring all claims and debts, known or unknown, to the respective sole shareholder, the assets and liabilities were transferred first to the Parent Company and then to the Defendant.

In addition, the Luxembourg District Court disregarded the transfer of the shares in the Parent Company to a third party, as the Defendant signed the minutes of the general meeting of the sole shareholder of the Parent Company, dated 31 December 2020, evidencing that he was still the sole shareholder of the Parent Company at that time.

This judgment reminds us that in the context of voluntary liquidation, for the shareholder(s) – when not acting as liquidator – to avoid being held responsible for the company's unsettled debts after its liquidation, it is recommended that the shareholders do not approve the transfer of all assets and liabilities of the company to the shareholder(s), otherwise such resolution defeats the purpose of the liquidation and is – in this regard – treated as a dissolution without liquidation.

In a classic liquidation process, the liquidator must ensure that all debts and liabilities are settled before proceeding with the closure of the liquidation, or record sufficient provisions to cover these debts in the liquidation accounts.

In the present case law, the Defendant acted as sole shareholder and liquidator, consequently, even though the resolutions of the sole shareholder had not decided to transfer all claims and debts, known or unknown, to their respective sole shareholder, the Defendant would have been ultimately liable for the payments of the debts as a result of his faults in conducting the liquidation as he did not properly settle the outstanding invoices or record appropriate provisions in the liquidation accounts.

5. Bankruptcy – Condemnation of directors to pay the company's debts and fully pay up their shares and ban on engaging in commercial activities

Luxembourg Court of Appeal, 5 March 2024, no 45/24-IV-COM, role number CAL-2022-00987

The bankruptcy receiver (the **Bankruptcy Receiver**) of a Luxembourg public limited liability company (*société anonyme*) declared bankrupt (the **Company**) sued the *de jure* director and the *de facto* director of the Company (together the former directors) for the payment of (i) some of the Company's debts and (ii) the remaining subscription price of the shares.

In the first instance, the Luxembourg District Court found that the former directors made numerous suspicious withdrawals, payments and wire transfers, and the Company did not hold proper accounts or publish any balance sheets since its registration with the Luxembourg trade and companies register (the **RCS**). It concluded that these wrongful acts contributed to the Company's bankruptcy and condemned the former directors to pay the Company's debts and banned them from engaging in commercial activities for five years.

The Luxembourg District Court also considered that the Company's shares – transferred to the *de jure* director – were not fully paid up and condemned the transferee of the shares to pay the remaining subscription price of the shares.

The Luxembourg Court of Appeal generally confirmed the decision of the Luxembourg District Court as follows:

- Action to make the former directors liable for the Company's debts[2]

The Luxembourg Court of Appeal recalled that article 495-1 of the Commercial Code allows, in the event of insufficient assets in the bankruptcy of a company, to hold the *de jure* or *de facto* directors liable for the debts of the company in whole or in part, with or without solidarity, against whom serious and "characterised" faults contributing to the bankruptcy are established[3]. The Court recalled that such a fault may include massive withdrawals made by a director from the company's assets, holding incomplete accounts or the absence of accounting, non-payment of tax and social charges, or allowing the company to assume obligations knowing that it does not have the necessary funds to make these investments.

In this case, the Luxembourg Court of Appeal confirmed that:

- the suspicious withdrawals,
- payments and wire transfers, and
- the fact that the Company did not hold proper accounts or publish any balance sheets since its registration with the RCS contributed to the Company's bankruptcy and condemned the former directors to pay some of the Company's debts.

[2] In a ruling dated 2 July 2024, the Luxembourg Court of Appeal also confirmed that article 495-1 of the Commercial Code applies to all directors, even if they lost this status before the bankruptcy (in this case, the director had been dismissed before the company's bankruptcy). The Court of Appeal also confirmed that the action for liability is subject to a special limitation period of three years from the final verification of claims (Luxembourg Court of Appeal, 2 July 2024, no 120/24-IV-COM, role numbers CAL-2021-00249 and CAL-2021-00473).

[3] The Luxembourg Court of Appeal reaffirmed that the action to make the directors liable for the company's debts only sanctions proven and indisputable faults, namely an "unforgivable fault that a reasonably prudent and diligent director would not have committed, violating the basic norms of the corporate life, not to be confused with wilful misconduct (dol) although being closed to it. The fault must also be characterised, meaning "clearly marked", which implies that the act must be perceived as gravely faulty by any reasonable person". See, in particular, Coipel M., "Les sociétés privées à responsabilité limitée", Rép. Not., T. XII, Le droit commercial et économique, Livre 4, Bruxelles, Larcier, 2008, n°317-2.

- Request to release the share capital[4]

The *de jure* director had been transferred all of the shares of the Company by notarial deed but argued that this transfer had never been recorded in the Company's share register and that, consequently, the transfer was not opposable to the Bankruptcy Receiver. The Luxembourg Court of Appeal rejected these arguments, recalling that if, in principle, the ownership of a nominative share is established by its transcription in the register of nominative shares, this inscription is not an irrebuttable presumption and does not constitute a sacrosanct requirement for the establishment of ownership[5]. The Luxembourg Court of Appeal also specified that the obligation to fully pay up the shares does not rest solely with the original subscriber but is transferred with the shares to the transferee, in accordance with article 430-13 of the 1915 Law. It concluded that, as the transferee of the not-fully paid-up shares, the *de jure* director was required to fully pay up them, irrespective of any potential action against the original subscriber of the shares.

- Professional ban

In view of the serious and "characterised" faults that contributed to the Company's bankruptcy, the Luxembourg Court of Appeal confirmed the ban from engaging in commercial activity for five years for the former directors, based on article 444-1 of the Commercial Code.

This ruling illustrates the strict application of the provisions of the Commercial Code concerning the liability of company directors in the event of bankruptcy. It clarifies the conditions under which directors can be held liable for the company's debts due to serious and "characterised" faults, such as the absence of regular accounting and the use of the company's assets for private purposes. Moreover, it reaffirms the obligation of shareholders to fully pay up their shares, even in the event of a transfer of shares. Finally, it highlights the importance of the ban from engaging in commercial activities as a deterrent sanction for faulty directors.

[4] In 2024, judges had several opportunities to rule on the obligation to release share capital.
- In a judgment of 28 March 2024, the Luxembourg District Court rejected the argument of a company's shareholder claiming to have paid the amount of the shares via a loan granted to the company by the shareholder's ultimate beneficial owner. The judge considered that the shareholder was unable to prove that the loan granted by the ultimate beneficial owner was intended for the release of share capital (Luxembourg District Court, 28 March 2024, no 2024TALCH20/00043, role number TAL-20219-03807).
- In a judgment of 8 May 2024, the Luxembourg District Court upheld the request for the release of share capital after recalling the terms of articles 420-19 and 430-13 of the 1915 Law and after noting that the shareholder had failed to meet their obligation (Luxembourg District Court, 8 May 2024, no 2024TALCH06/00321, role number TAL-20223-03807).
- In a judgment of 24 May 2024, the Luxembourg District Court held that the bankruptcy receiver's formal notice constituted a call for the release of unpaid shares. The shareholder, having not responded to this call, was ordered to release the balance of the share capital (Luxembourg District Court, 24 May 2024, no 2024TALCH11/00081, role number TAL-20224-01204).
- In a ruling of 25 June 2024, the Luxembourg Court of Appeal confirmed the judgment of the Luxembourg District Court of 16 November 2023, commented on in our previous Case Law Briefing. In this case, a company contested its status as a shareholder by referring to an attendance list from an extraordinary general meeting of the company. In the first instance, the judge rejected this argument, noting the absence of a transfer of shares and the lack of publication of this transfer in accordance with article 430-12 of the 1915 Law. The Court of Appeal confirmed that the company, as the sole shareholder, was responsible for the debt arising from the unpaid portion of the share capital (Luxembourg Court of Appeal, 25 June 2024, no 114/24 IV-COM, role number CAL-2024-00105).
- In a ruling of 17 December 2024, the Luxembourg Court of Appeal addressed the obligation of a shareholder to fully release the share capital despite the transfer of its shares. The Court reiterated that, to be enforceable against third parties, including the bankruptcy receiver, the transfer of shares must be published. In this case, the transfer had not been published, rendering it unenforceable. Consequently, the shareholder remained obliged to fully release the share capital (Luxembourg Court of Appeal, 17 December 2024, no 197/24 IV-COM, role number 2024-00399).

[5] Luxembourg Court of Appeal, 7 May 2025, Pas. 37, p. 370; Luxembourg Court of Appeal, 16 November 2026, Pas. 38, p. 303.

6. Nullity of public limited liability companies – Nullity can only be pronounced if provided under article 100-18 of the 1915 Law

Judicial dissolution for cause – Dissolution can only be pronounced in cases of paralysis of the company's operation

Luxembourg District Court, 6 March 2024, no 2024TALCH15/00333, role numbers TAL-2022-06302 and TAL-2023-02257

This dispute involved a Luxembourg public limited liability company (*société anonyme*) (the **Company**) and two of its shareholders, together holding 32% of the share capital (the **Shareholders**). The Shareholders requested the annulment of the Company on the grounds that it had been incorporated without their consent using false proxies, and the Shareholders did not approve the split of the shareholding provided under the articles of association. Alternatively, they requested the judicial dissolution of the Company for cause (*justes motifs*) due to a serious disagreement between shareholders. They indicated that they were not convened to the general meeting for the incorporation of the Company, or to the extraordinary general meeting that followed the incorporation of the Company, notably appointing new directors.

- Request for nullity of the Company

The Shareholders based their request for nullity of the Company on article 100-18 of the 1915 Law, alleging that they did not consent to the incorporation of the Company or to its articles of association.

The Luxembourg District Court rejected the request, concluding that the alleged lack of consent did not constitute a cause of nullity provided under article 100-18 of the 1915 Law. It recalled that article 100-18 narrowly lists the grounds for nullity of public limited liability companies, including formal and substantive defects.

- With regard to formal defects, the nullity of a company can be pronounced if the incorporation deed is not drawn up in a notarial form or if that deed contains no indication of the company's name, corporate object, contributions, or the amount of subscribed capital.

- With regard to substantive defects, the nullity of a company can be pronounced if its corporate object is illegal or contrary to public order, or if it does not include at least one validly committed founder.

The Luxembourg District Court noted that the alleged absence of consent does not constitute a cause for nullity under article 100-18 of the 1915 Law and therefore rejected the claim.

- Request for judicial dissolution for cause[6]

Alternatively, the Shareholders requested the judicial dissolution of the Company for cause, based notably on article 480-1 of the 1915 Law. The Luxembourg District Court recalled that under the terms of this article, judicial dissolution can only be pronounced if there is a serious disagreement between shareholders and if this disagreement paralyses the company's operations. It also recalled that judicial dissolution must be limited to particularly serious cases and judicial intervention in the internal life of companies must remain exceptional.

The Luxembourg District Court found that no element submitted for its assessment proved that the Company's operations were paralysed due to a disagreement between the Shareholders. It also noted that the Shareholders had not proven the absence of collaboration between them nor a disagreement such that it resulted in the loss of the *affectio societatis*. The Luxembourg District Court further emphasised that the Shareholders had not attempted to convene a general meeting to decide on the voluntary dissolution of the Company, preferring to opt for judicial dissolution. It recalled that judicial dissolution should not be pronounced when there are other less radical means to remedy the situation. Since the evidence provided did not lead to the conclusion that the Company was no longer functioning or that its economic situation was compromised, the judge declared the request for judicial dissolution unfounded.

This judgment reiterates the strict conditions under which a public limited liability company can be annulled or judicially dissolved in Luxembourg. It reaffirms that the causes of nullity are narrowly listed by law and the absence of shareholders' consent is not a ground for nullity under article 100-18 of the 1915 Law. Moreover, it recalls that judicial dissolution for cause must be based on solid evidence of a disagreement paralysing the company's operations, and that this route is secondary to the other available means for resolving internal conflicts.

[6] In 2024, the judges had several opportunities to rule on requests for judicial dissolution for causes.
- In a judgment of 22 March 2024, the Luxembourg District Court found a request for judicial dissolution well-founded due to serious disagreements between the shareholders and financial difficulties. The company had been incorporated for an unlimited period, and the dissolution was pronounced on the basis of articles 1865, 1869, and 1870 of the Civil Code (Luxembourg District Court, 22 March 2024, no 2024TALCH10/00051, role number TAL-2023-02538).
- In a judgment of 28 March 2024, the Luxembourg District Court found a request for judicial dissolution well-founded based on article 710-3 of the 1915 Law due to the failure of the company's main project and its deficit financial situation, as well as the blocking of decisions by one of the shareholders (Luxembourg District Court, 28 March 2024, no 2024TALCH06/00243, role number TAL-2023-05228).
- In 2024, the judges also had the opportunity to rule on requests for the appointment of a provisional administrator due to the paralysis of the company.
- In a judgment of 31 May 2024, the Luxembourg District Court noted the serious disagreement between shareholders and a paralysis of the normal operation of the company and deemed it urgent to appoint a provisional administrator to ensure the company's day-to-day management. In this case, the company had not published its accounts since 2020, and one of the equal shareholders alleged serious faults and financial irregularities, including misappropriation of funds, against the other equal shareholder. He also claimed that this shareholder had used the company's funds for personal gain. The judge recalled that although he did not have the power to assess in detail the merits of the accusations, he recognised that they contributed to the paralysis of the company (Luxembourg District Court, 31 May 2024, no 2024TALREFO/00045, role number TAL-2023-08466).
- In a judgment of 16 October 2024, the Luxembourg Court of Appeal rejected the request of a minority shareholder for the appointment of a provisional administrator on the grounds that there was no paralysis of the company jeopardising its interests and that the alleged breaches of the 1915 Law were not sufficient to justify such an appointment (Luxembourg Court of Appeal, 16 October 2024, no. 124/24-VII-REF, roll number CAL-2023-00938).

7. Effects of the merger by absorption on legal proceedings – Nullity of any legal action initiated after the loss of legal personality of the absorbed company

Luxembourg Court of Peace, 14 May 2024, no L-BAIL-802/23, role number 1613/24

In March 2022, two Luxembourg public limited liability companies (*sociétés anonymes*) (the **Lessor** and the **Lessee**) concluded a lease agreement effective from 1 June 2022 to 31 May 2031. The agreement related to the rental of a storage hall, offices, and an external parking lot. The Lessor requested the judicial termination of the lease due to the arrears of rent and charges. The Lessee argued the inadmissibility of the request by invoking the lack of legal personality of the Lessor at the time of the filing of the request, the latter having been absorbed by another company (the **Absorbing Company**) before the request was filed.

The Luxembourg Court of Peace recalled that a merger by absorption results in the dissolution without liquidation of the absorbed company and the universal transfer of all its assets and liabilities to the absorbing company. The Absorbing Company acquired, by effect of law, on the date of the general meeting approving the merger, the capacity to continue all proceedings initiated by the absorbed company before that meeting. The Absorbing Company thus immediately has the capacity to act, regardless of whether the merger has been made known to third parties. It follows that from the approval by the general meeting, the absorbed company no longer has a legal personality due to the merger by absorption, and is therefore deprived of the right to act in court, both in claim and defence. The Luxembourg Court of Peace also recalled that when a company has no legal personality, the nullity of the introductory act of the legal action results from a lack of capacity of the absorbed company. This defect cannot be remedied, even by intervention of the absorbing company during the proceedings.

In this case, the merger between the Lessor and the Absorbing Company was approved by the Lessor's general meeting on 27 October 2023. Consequently, the Lessor lost its legal personality on that date. The legal request filed by the Lessor on 23 November 2023 was therefore invalid as the Lessor no longer legally existed.

The Luxembourg Court of Peace also rejected the Absorbing Company's attempt to take over the proceedings, as the nullity of the introductory act of the legal action cannot be remedied by intervention of the Absorbing Company during the proceedings.

The Court therefore declared null the request introduced by the Lessor and the act of taking over the proceedings by the Absorbing Company.

This judgment recalls the legal consequences of a merger by absorption on a company's capacity to act in court. It reaffirms that the loss of legal personality of an absorbed company is immediate upon the approval of the merger by the general meeting of the absorbed company, and that any legal action initiated against the absorbed company after the absorbed company lost its legal personality is null and void. Furthermore, it recalls that this nullity cannot be remedied by the absorbing company during the proceedings. That being said, the absorbing company could of course in its own name, as legal successor to the absorbed company, initiate new proceedings.

8. Dividend claim – The receivable only exists from the decision of distribution by the general meeting of shareholders and is only due on the payment date

Diekirch District Court, 31 May 2024, no 2024TADCOMM/0215, role number TAD-2024-00408

Two individuals (the **Plaintiffs**) initiated a legal action against a Luxembourg private limited liability company (société à *responsabilité limitée*) (the **Company**) and its managers for wrongful distribution of dividends in violation of a garnishment (*saisie*) validated by a previous judgment. They argued that the liability of the Company's managers should be engaged based on articles 710-16 and 441-9 of the 1915 Law, for having committed mismanagement faults in the exercise of their mandate. They also invoked a claim for tort liability of the Company for having distributed dividends in breach of the garnishment.

The Diekirch District Court referred to a decision of the French Court of Cassation of 13 September 2017 (no. 16-13/674) in which the Court stated that "*dividends do not have legal existence before the determination of distributable amounts by the competent corporate body and the allocation of the profits to each shareholder, so that in the absence of such a decision, the company is not a debtor to the shareholder*". The Court then noted that in line with the decision of the Court of Cassation and position of Luxembourg authors, at the time of the judgment approving the garnishment, the Company was not yet a debtor of the shareholders, since the receivable only exists from the general meeting approving the Company's financial statements and the distribution of profits.

The Diekirch District Court further noted that the date on which the dividend payment was to occur was not determined yet. In the absence of a fixed payment date, the dividend receivable was not yet due and payable (*exigible*).

Moreover, the Diekirch District found no evidence that any actual payments had been made to the shareholders contrary to the garnishment order. It also noted that the Plaintiffs had not approached the Company to obtain payment of their receivable by invoking the rights of the seized debtor.

On this basis, the Diekirch District Court concluded that it was not established that the Company had proceeded with the payment of dividends. Consequently, the Plaintiffs' claims to engage the liability of the Company and its managers were declared unfounded.

This judgment confirms the basic and uncontroversial principle that dividends do not have legal existence before the competent corporate body has determined the distributable amounts. In the absence of such a decision, the company is not a debtor to the shareholder.

9. Distinction between corporate action and individual action – Individual shareholders must prove a distinct personal damage to be able to pursue legal action against the directors

Abuse of majority – The abuse of majority can only be invoked for decisions taken by the general meeting of shareholders and not by the directors or the liquidator

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Luxembourg District Court, 5 November 2024, no 2024TALCH01/00295, role number TAL-2021-09723

The minority shareholder (the **Minority Shareholder**) of a Luxembourg public limited liability company (*société anonyme*) in liquidation (the **Company**) and the beneficial owner of the Minority Shareholder (together, the **Plaintiffs**) brought an action against the liquidator and several directors of the Company to obtain compensation for a loss corresponding to their *pro rata* share (24%) of the Company's overall loss resulting from the Company's faulty management.

The Minority Shareholder notably alleged that the Company's directors: granted disputed loans without the Minority Shareholder's consent, sold subsidiaries at a symbolic price, and sold merchandise stocks at a loss. The Plaintiffs also claimed that the Company's liquidator had not taken all actions in the best interest of the Company, and notably did not recover the loans granted. They also claimed that he did not submit the liquidation results to the Company's general meeting of shareholders and did not inform the shareholders of the reasons that prevented the closure of the liquidation and the publication of the Company's annual accounts.

In order to be indemnified, the Plaintiffs invoked an abuse of majority, and based their action on articles 441-9, 1100-4, 1100-13, and 1100-14 of the 1915 Law.

The Luxembourg District Court recalled the distinction between the individual and social action in relation to the liability of company directors. According to the Luxembourg doctrine and case law, the distinction is based on the person suffering the damage:

- If the loss is suffered by the legal entity itself (the company), only the company can act against the faulty directors by exercising the social action. The indemnification, if any, will be paid to the company and not to the shareholders individually. This is the "*actio mandati*", as the action is based on the faulty execution of the directors' mandate. It is also called the "*actio ut universi*", given that it is the company that claims indemnification for the damage suffered by all the shareholders. This action can be exercised *ut singuli* in public limited liability companies by minority shareholders holding at least 10% of the voting rights at the general meetings when the company fails to act.

- If the damage is suffered by one or more shareholders individually, these persons can claim for damages by bringing an individual action. Under current Luxembourg law, shareholders cannot individually exercise the social action on behalf of the general meeting; they can only act due to specific damage they have personally suffered.

The Luxembourg District Court then considered that the mismanagement (*faute de gestion*) committed by the directors fell under the social action since the loss affected all of the shareholders. Similarly, the loss of value of the shares due to the directors' actions caused a damage to all the shareholders. Therefore, no individual action was possible.

The Luxembourg District Court then recalled that the abuse of majority is defined as a corporate resolution taken in contradiction with the general interests of the company, with the sole purpose of benefitting the majority shareholders. It combines two elements:

- an objective element: the decision harming the company's interests; and
- a subjective element: the personal motives of the majority to the detriment of the minority.

The sanction for an abuse of majority can consist of condemning the majority shareholders to pay damages to the minority shareholders, cancelling the resolution passed, or exceptionally, appointing an *ad hoc* administrator.

The Luxembourg District Court also recalled that the abuse of majority can only be invoked in relation to decisions taken by the shareholders' meeting and not decisions taken by the board of directors or the liquidator. In this case, no decision of a general meeting was challenged by the Plaintiffs, but only the decisions taken by the directors and the liquidator. The Luxembourg District Court then concluded that the Plaintiffs did not have sufficient grounds for action against the directors and the liquidator of the Company, and therefore, their claim was inadmissible.

This judgment reaffirms the principle that individual shareholders cannot bring legal actions for damages before courts for losses suffered by the company itself unless they can prove a distinct personal loss. It also reminds us that the abuse of majority can only be invoked in relation to decisions taken by the general meeting of shareholders and not those taken by the directors or the liquidator. This distinction is crucial to avoid confusion between mismanagement of the directors and the abuses of majority by majority shareholders.

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