

# The evolution of insolvency law in Luxembourg

Annie Elfassi and Kyllian Talbourdet outline the strict interpretation of exceptions and broader implications of the amendments to Article 465 of the Commercial Code in Luxembourg



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**L**uxembourg insolvency law dates back to July 1870. Since its enactment, insolvency law has continuously evolved, influenced by legislative changes and judicial interpretations. On 19 July 2023, the Parliament of the Grand Duchy of Luxembourg passed bill No. 6539A into a Law of 7 August 2023 that entered into force on 1 November 2023 (“New Insolvency Law”), marking a significant milestone in the modernization of the Luxembourg insolvency framework.

This bill has been under discussion for a number of years and aims to enhance the preservation of financially distressed companies. One of the significant developments regarding the New Insolvency Law is the amendment of Article 465 of the Commercial Code, which has sparked discussions about its potential to broaden the scope of what is considered as part of insolvency matters (matière de faillite). This article explores the implications of this particular amendment when put into perspective with the principles of strict interpretation of exceptions and legal certainty.

## Article 465 of the Commercial Code: An overview

Article 465 of the Commercial Code has been a cornerstone in defining one crucial parameter of insolvency: the appeal against first instance judgments in the context of insolvency proceedings. The recent amendments to the

provisions of Article 465 have introduced new elements that could potentially expand the definition of insolvency matters. Understanding these changes is crucial for insolvency practitioners and businesses alike.

The previous version of Article 465 provided that any judgment rendered in insolvency matters was provisionally enforceable and subject to an appeal period of only fifteen (15) days calculated as from the date of service of the judgment. This short timeframe aimed to ensure a swift handling of insolvency appeal proceedings without compromising the rights and guarantees of the parties involved. However, this approach had significant drawbacks. The short appeal period often led to hastily prepared appeal documents of lower quality, while the written procedure for appeals, known for its slower pace and higher costs due to the drafting and memoranda by counsels to each of the parties involved, remained unchanged.

The new version of Article 465 addresses these issues by extending the appeal period to forty (40) days and introducing an oral procedure for appeals against first instance judgments intervened. This change aims to balance the need for a swift process with the necessity of giving appellants sufficient time to prepare their cases properly.

## Definition of “Insolvency Matters” in Luxembourg Case Law

In Luxembourg case law, the notion of insolvency matters is defined with a specific scope. The

courts have consistently interpreted it to include only those disputes that arise directly from the state of insolvency. This means that the dispute must be inherently linked to the insolvency itself and could not have arisen without the occurrence of the insolvency.

For example, the Luxembourg Court of Appeal has stated that “matière de faillite” applies when the dispute is such that it could not have occurred without the insolvency and finds its source in the state of insolvency. Conversely, disputes that, although arising during insolvency and affecting the insolvency estate, have a cause unrelated to insolvency law and could have arisen independently of the insolvency, do not fall under “matière de faillite”.

This strict interpretation ensures that only disputes intrinsically connected to the insolvency process are subject to the specific procedural rules of insolvency law, while other disputes are handled under general legal principles. This approach helps maintain clarity and consistency in the application of insolvency law.

## Strict interpretation of exceptions and insolvency law

One of the fundamental principles in Luxembourg’s legal framework is the strict interpretation of exceptions. This principle ensures that exceptions to general rules are not applied broadly, thereby maintaining the spirit of the law. In the context of insolvency appeals, strict interpretation is vital to define



*The new law marks a significant milestone in the modernization of the Luxembourg insolvency framework*



what type of court decisions may be subject to the special appeal provided for in Article 465.

However, the extension of the appeal period from fifteen (15) to forty (40) days under the new Article 465 aligns the appeal period with the common rules of the civil procedure in the sense that any first instance judgment rendered in an action on the merits can be appealed within forty (40) days as from its service to the opposing party/ies. This alignment raises questions about whether the scope of Article 465 should be as strictly interpreted as it used to be. The previous strict interpretation was partly justified by the shorter appeal period (of fifteen days), which necessitated a more rigid approach to avoid shortening the appeal period for judgments that were outside the scope of insolvency matters. With the extended appeal period, there is a stronger argument for a more flexible interpretation that allows for a broader definition of insolvency matters which could endanger situations that do not derive directly from insolvency or those that are strictly connected to the insolvency.

In fact, while these changes aim to modernize and streamline the process, they also raise concerns about potential overreach. A broader interpretation of these criteria could lead to more judgments being classified as rendered in the context of insolvency matters, thus bearing the risk of their appeals being declared inadmissible if not filed under the new rules of Article 465 (i.e., under the oral procedure).

A recent decision of the Luxembourg Court of Appeal<sup>1</sup> highlights the importance of adhering to the new procedural requirements introduced by the amendment of Article 465. In this case, the appeal filed against an insolvency judgment was deemed inadmissible due to the absence of a fixed-date appearance (*assignation à date*) in the appeal writ, the court emphasized the need to follow

the new procedural rules strictly. This decision underscores the importance of understanding and complying with the new requirements to avoid procedural pitfalls.

### Balancing modernization and legal integrity

Modernizing insolvency law is essential to address contemporary economic challenges. However, it is equally important to maintain the integrity of the legal framework. This balance can be achieved by adhering to the principles of strict interpretation of exceptions and legal certainty (*sécurité juridique*), ensuring that the amendments to Article 465 are applied judiciously and do not result in an uncontrolled extension of the definition of insolvency matters.

The new Article 465 aims to streamline the insolvency appeal process by introducing an oral procedure and extending the appeal period. This modernization effort is commendable, but it must be implemented carefully to avoid unintended consequences. The courts must ensure that the new provisions are applied in a way that maintains the certainty of the insolvency process and protects the rights of all parties involved.

Examining recent case studies and judicial interpretations can provide insights into how the amendments to Article 465 are being applied. These examples highlight the importance of a nuanced approach, where the courts balance the need for modernization brought forward by the legislator with the principle of strict interpretation of exceptions and legal certainty.

The Luxembourg Court of Appeal's decision in March 2024 serves as a critical case study. This decision not only illustrates the importance of understanding and complying with the new procedural requirements but also highlights the future challenges



that may arise from the new provisions of Article 465. In particular, it should be noted that in this case, the Court of Appeal had to rule on an appeal rendered against a judgement declaring the insolvency of the debtor. Thus, the question did not relate to the definition and scope of insolvency matters. Only future decisions of the Court of Appeal will answer the question of whether or not, the scope of insolvency matter will be widened.

### Conclusion

The amendment of Article 465 of the Commercial Code represents a significant development in insolvency law. While it offers opportunities for modernization, it also necessitates a careful and strict interpretation to prevent unintended consequences and generating uncertainty. By maintaining this balance, the legal framework can continue to serve its purpose effectively, ensuring fair and just outcomes for all parties involved. ■

#### Footnote:

<sup>1</sup> Cour d'appel, 26 mars 2024 N° 59/24 IV-COM.



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