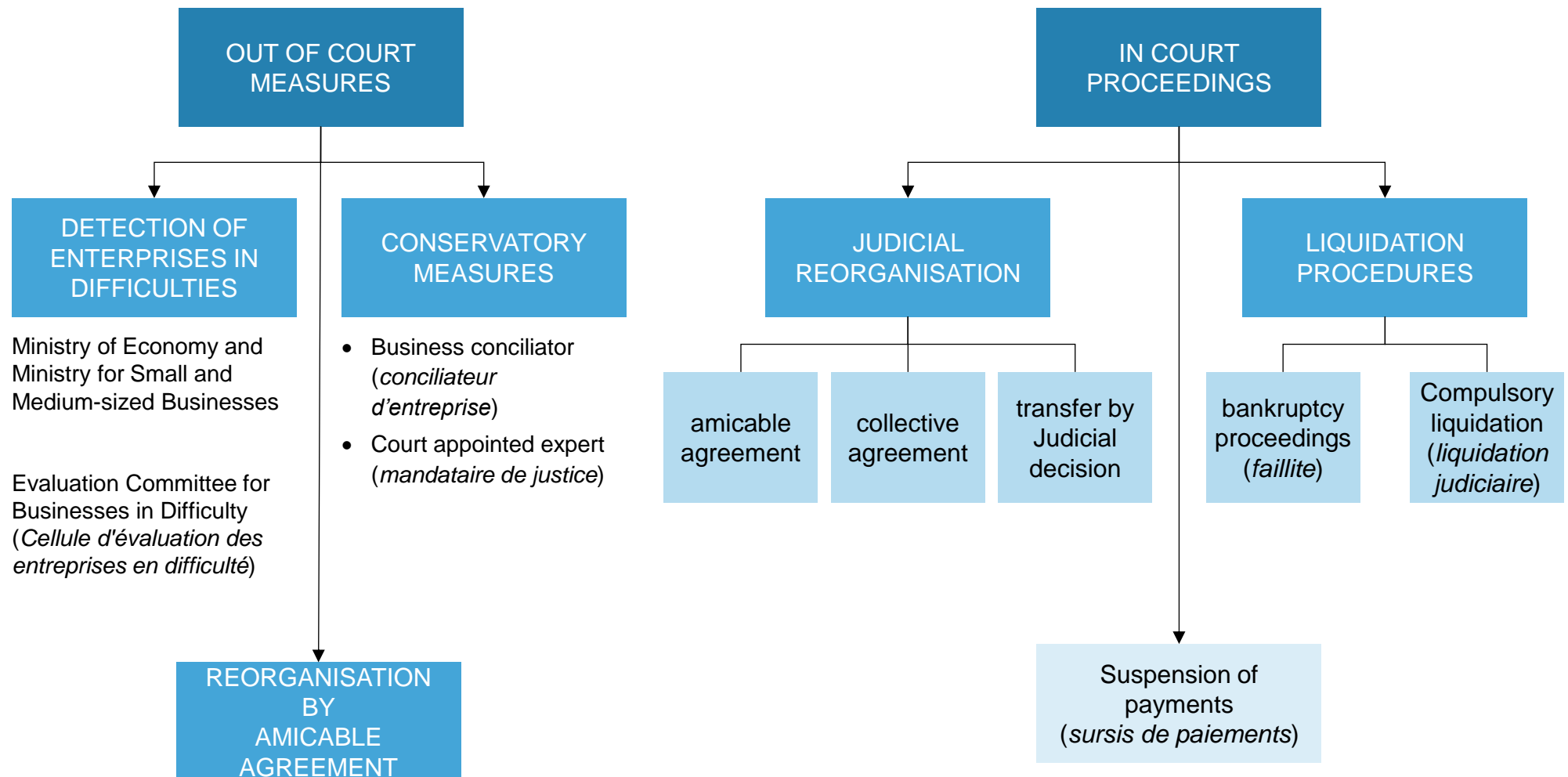


**C L I F F O R D**  
**C H A N C E**

**CASE LAW ON THE BUSINESS PRESERVATION LAW OF 7 AUGUST 2023**

24 APRIL 2025

# OVERVIEW



# CONSERVATORY MEASURES

## DESIGNATION OF A COURT-APPOINTED EXPERT (MANDATAIRE DE JUSTICE)

Luxembourg District Court, 7 June 2024 (TAL-2023-10225)

### Two conditions to appoint the expert :

- Existence of serious and characterised breaches by the debtor or its organs that threaten the business' continuity.
  - Evidence that the measure is likely to preserve the business.
- 
- The court appointed expert in the context of the business preservation law is seen as a specific application of the provisional administrator under general law.
  - The appointment must respect the principles of proportionality and of minimal interference in the debtor's affairs.
  - Judges have broad powers to define the experts' assignments, aiming to implement specific temporary measures.
- 
- Belgian law broadened criteria.
  - "Serious and characterised breaches" are distinctly marked failures that threaten business continuity.

# CONSERVATORY MEASURES

## ROLE OF THE COURT-APPOINTED EXPERT

Luxembourg District Court, 31 January 2025 (TAL-2023-1022)

Court appointed-experts can mediate and assist board of directors with no voting rights, providing targeted interventions to support management, with tasks such as:

- 
- Attending board meetings.
  - Monitoring the implementation of measures to safeguard all parties' rights.
  - Inventorying possible solutions to preserve the company.
  - Proposing measures for debt reduction and creditor repayment.
  - Authorising significant asset disposals.
  - Reviewing transactions involving related members.
  - Facilitating amicable separations among shareholders.
  - Performing necessary actions to execute these duties.

# REQUEST FOR OPENING THE REORGANISATION PROCEEDINGS

## THRESHOLD

Luxembourg District Court, 12 April 2024 (TAL-2024-02679)

- Minimal conditions for initiating the procedure.
- The opening does not depend on the debtor's good faith but rather on the threat to business continuity. Criminal facts must be disregarded by courts.

## FORMALITIES

**Need to comply with legal obligations**

Court of appeal, 11 February 2025 (CAL-2024-01095)

- Obligation to comply with legal obligations.

**Regularisation of the debtor's situation ex post**

Luxembourg District Court, 2 May 2024 (TAL-2024-03025)

Court of appeal, 18 June 2024 (CAL-2024-00499)

- Ex post regularisation accepted for debtors (except in case of a business transfer).
- Possibility to submit required documents at the appeal stage.

# FIRST STEPS AND EFFECTS OF OPENING

## CREDITORS CAN STILL PURSUE THEIR CLAIM IN COURT

Luxembourg District Court, 8 May 2024 (TAL-2023-09023)

- No enforcement actions and no seizures on suspended claims possible during the suspension period on the debtor's movable and immovable property.
- Creditors can continue procedures, initiated before the opening of the judicial reorganisation procedure, to obtain an enforceable title, which will however not be enforced if it concerns suspended claims.

## INFORMATION OF CREDITORS OF THEIR CLAIM

Luxembourg District Court, 8 May 2024 (TAL-2023-09023)

- Importance of the debtor providing information to creditors about their claims within 14 days after the opening of the proceedings.
- Possibility for creditors to agree or contest their claims.
- Failure to inform creditors can impact the reorganisation plan and might result in criminal sanctions.

# FIRST STEPS AND EFFECTS OF OPENING

## NOMINATION OF A PROVISIONAL ADMINISTRATOR

Luxembourg District Court, 20 December 2024 (TAL-2024-10223)

Luxembourg District Court, 5 April 2024 (TAL-2024-02499)

Luxembourg District Court, 22 November 2023 (TAL-2023-09252)

Requirement of a serious and characterised fault of the debtor or one of its bodies.

Such appointment must be justified, qualified and motivated.

Examples of faults: failing to publish annual accounts, having debts nevertheless issuing dividends, continuing operations without having necessary licenses after the death of a key individual.

# ACCELERATED END TO THE REORGANISATION

## DEBTOR IS EVIDENTLY NO LONGER ABLE TO ENSURE THE CONTINUITY OF ITS ACTIVITIES.

- Operating account is negative during stay (*sursis*)
- Under-capitalisation of company (no)

## INFORMATION PROVIDED TO THE COURT, OR THE CREDITORS IS EVIDENTLY INCOMPLETE OR INACCURATE.

- Strict duty of loyalty and transparency of the debtor.
- Duty to disclose any “*obligation which may influence the smooth conduct of the reorganisation and any signification increase of its liabilities*”, including off-balance sheet commitments.

Luxembourg District Court, 10 March 2025 (TAL-2024-09943)

# COLLECTIVE AGREEMENT

## CONTENT OF THE REORGANISATION PLAN

### DESCRIPTIVE PART:

- description of the debtor's economic situation (balance sheet, reasons for difficulties, etc).
- motives how and why the plan can avoid the debtor's insolvency.

### PRESCRIPTIVE MEASURES:

- waiver of claims
- deferral of claims
- equity conversion, etc.

### Luxembourg District Court, 6 December 2024 (TAL-2024-06789):

- granting an extension to the debtor to produce a modified plan is exceptional
- limited discretion of the court
- no substitution of the court to the creditors

# COLLECTIVE AGREEMENT

## VOTE ON THE REORGANISATION PLAN

### Separate vote by each creditor “class”

- Secured creditors class (extraordinary stayed creditors)
- Unsecured creditors class (ordinary stayed creditors)



**Need for double majority of (i) creditors and (ii) value of claims.**

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### Possible regrouping of creditors in “categories” in the plan

- E.g., different amount of claims
- E.g., different nature of claims



**Possibility to treat categories differently in the plan**

Luxembourg District Court, 19 December 2024 (TAL-2024-03607):

- only creditors whose rights are “affected” by the plan can vote
- proportionate treatment within category
- distrustful attitude towards intragroup and related-party creditors

# COLLECTIVE AGREEMENT

## SANCTIONING BY THE COURT

### IF BOTH CREDITOR CLASSES APPROVE:

Luxembourg District Court, 10 May 2024 (TAL-2023-10048):

- court only verifies compliance with formalities and public order and absence of 'excessive harm to the creditor's rights'
- limited review of the feasibility of the plan and its ability to insure the viability of the debtor's business.

### IF ONLY ONE CREDITOR CLASS APPROVES:

- sanctioning of the plan by court if it is in the "*best interest of the creditors*"
- possibility to overrule negative vote of the dissenting class, under certain conditions.

# COLLECTIVE AGREEMENT

## RIGHTS OF CREDITORS: SECURED VS. UNSECURED

Measures that can be imposed by the plan without the individual consent of the creditor	Secured creditor	Unsecured creditor
<b>Deferral of payments</b>	Yes, for the principal (total maximum of 36 months).  No, for accruing interest.	Yes (up to five years)
<b>Conversion of claims into equity</b>	No	Yes (presumably up to a high percentage but not 100 %).
<b>Waiver of claims</b>	No	Yes (presumably up to a high percentage but not 100 %).

# TRANSFER BY COURT ORDER

*District Court of Luxembourg, 18 December 2023 (TAL-2023-09111) and Court of Appeal, 27 February 2024 (CAL-2024-00014)*



## KEY FEATURES

- Only for reorganization proceedings creditors or interested third-party acquirors.
- Aims at sale of debtor's business or activities per court order to ensure their going concern.
- Court-appointed agent will implement a sale or transfer of debtor's movable and/or immovable property under the control and with the approval of the court.



## R&I GAME CHANGER

- Implementable against debtor's will.
- 'Weaponization' by dissenting creditors.
- Precedent of cross-border, 1 billion+ and highly contentious restructuring of Luxembourg-based real estate holding group.



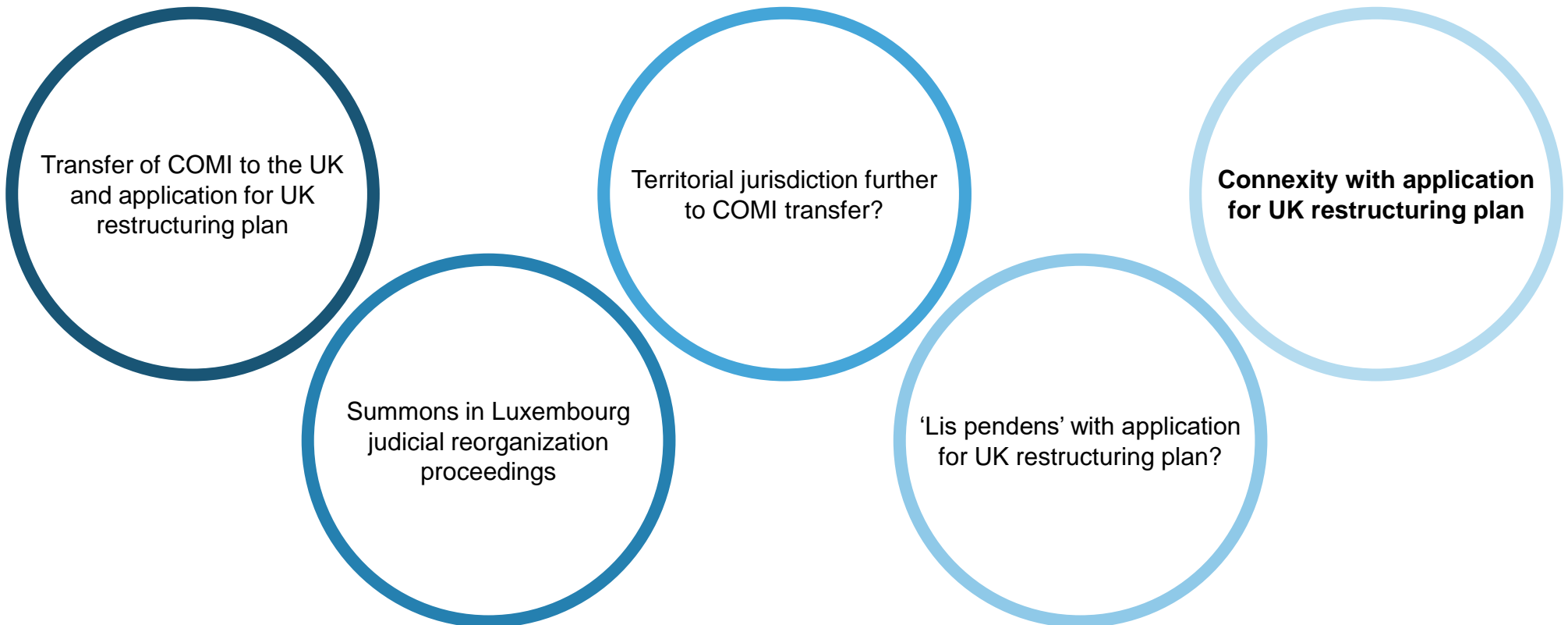
## NOVEL CASE LAW\*

- 'Creditor' per Art. 55(2) of the Law
- 'Interested third-party acquiror' per Art. 55(2) of the Law
- 'Transferable activity' per Art. 55(1) of the Law

# PRIVATE INTERNATIONAL LAW ASPECTS

## International lis pendens and connexity

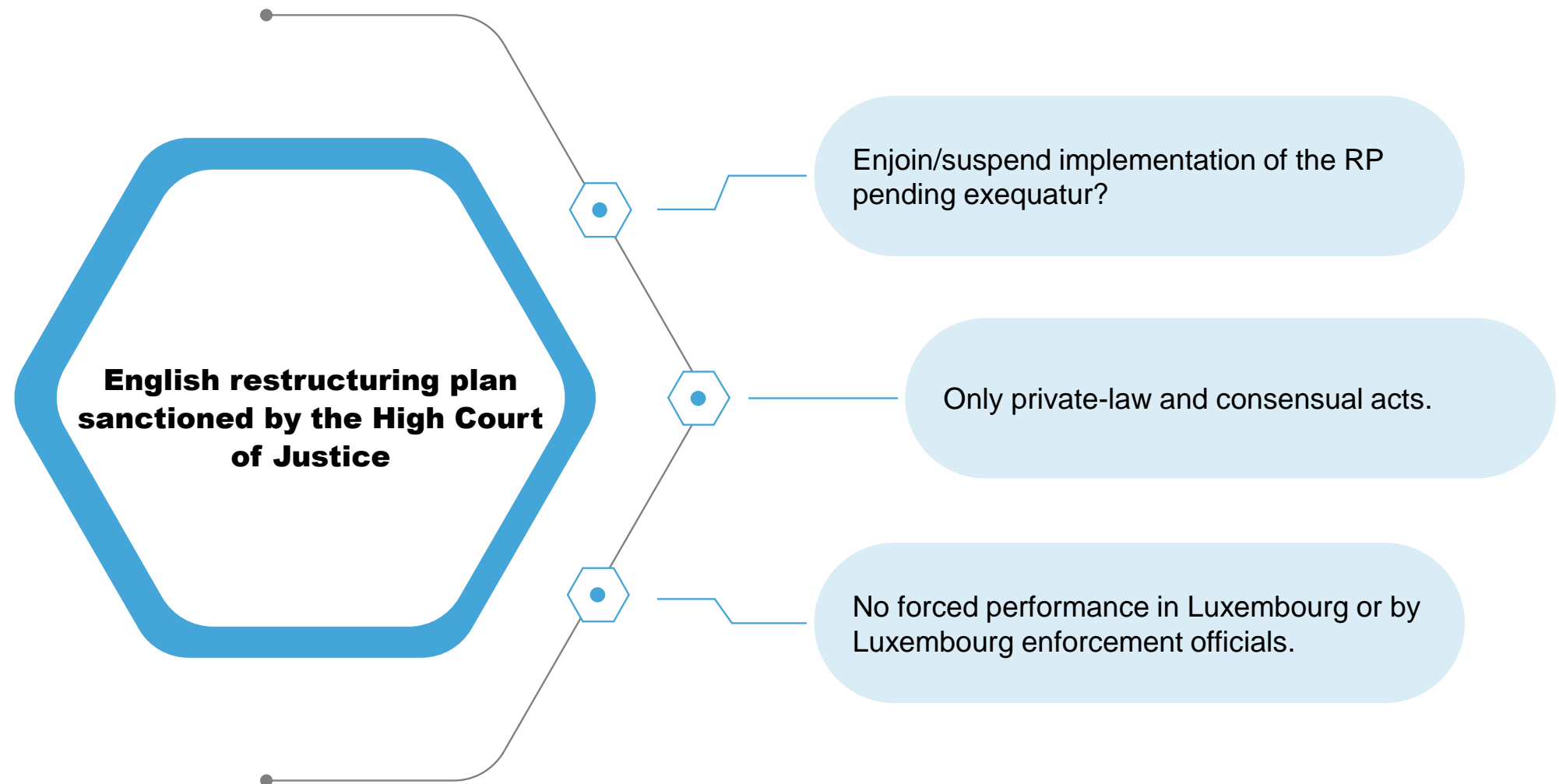
District Court of Luxembourg, 18 December 2023 (TAL-2023-09113)



# PRIVATE INTERNATIONAL LAW ASPECTS (CONTINUED)

## Recognition and enforcement of non-EU R&I proceedings

District Court of Luxembourg, 4 April 2025, docket n°TAL-2024-04932



# CONTACTS



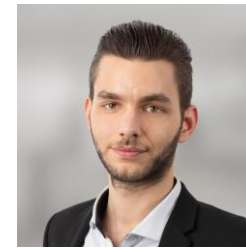
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