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Belgium

RESTRUCTURING & INSOLVENCY

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This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in Belgium.

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BELGIUM
RESTRUCTURING & INSOLVENCY

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

Security over immoveable property

A security interest over real estate is created by way of a mortgage. A mortgage can cover ownership of real property, e.g. land, buildings and constructions, including bare ownership rights, freehold interests as well as other real property rights, such as long-term lease rights.

A mortgage needs to be established by notarial deed. The notary will also take care of the registration of the mortgage in the mortgage registrar to make the mortgage enforceable against third parties. The timing of the registration determines the ranking. The registration is valid for thirty years. Besides the notary costs and fees, a registration fee of approximately 1.30% of the mortgage amount is due.

To avoid part of the registration fee, parties often agree to create a mortgage for a lower amount, and to provide the mortgagee with an irrevocable mandate (which is subject to a fixed registration fee of only € 50) to establish a (second) mortgage whenever the mortgagee deems it to be necessary. This mortgage mandate will only be an effective security in rem upon conversion into a regular mortgage, at the occasion of which the 1.30% registration fee will be due.

Security over movable property

The most common security over movable property is the pledge. Until recently, pledges still required some kind of dispossession of the pledgor, except for pledges on the business (which had to be registered). This changed in 2018 with the introduction of a national pledge register (https://financien.belgium.be/nl/E-services/pandregister). If the parties register the pledge, it is no longer necessary (albeit still possible) to dispossess the pledgor of the encumbered goods to create a valid and enforceable pledge. A registration of a pledge is subject to a fee which increases in function of the secured amount, with a maximum fee of 518.00,- euro for registrations made in 2023. The registration is valid for ten years.

Pledges on certain specific assets are still regulated separately. This concerns most notably pledges on receivables and pledges on financial collateral (cf. EU Directive 2002/47/EC of 6 June 2002).

In sales contracts, retention of title clauses are also commonly used. Such a clause will suspend the transfer of the ownership of the goods sold to the buyer until full settlement of the sales price. The goods can be reclaimed if the buyer fails to pay the purchase price, insofar the clause has been agreed to in writing, ultimately at the delivery of the goods. The retention of title is not subject to any requirement of registration or publication. If it is however registered in the national pledge register, it will remain enforceable even when the goods became immovable by incorporation in real estate or when they have been processed with or mixed with other goods.

2. What practical issues do secured creditors face in enforcing their security package (e.g. timing issues, requirement for court involvement) in out-of-court and/or insolvency proceedings?

Mortgage

A mortgagee will only be entitled to immediately enforce the mortgage upon default of the debtor if the notarial deed by which it is established contains all the elements to determine the existence and the amount of the outstanding secured claim. This explains why, when the mortgage is given to secure a credit, the mortgage deed will in principle incorporate a copy of the private credit

agreement. If the notarial deed does not contain all the elements to determine the existence and the amount of the outstanding secured claim, the mortgagee should first initiate proceedings on the merits to obtain an enforceable payment order from the court. The rules applicable to forced execution of immovable property also apply on the foreclosure process initiated by the mortgagee. It means the immovable property first needs to be attached by a bailiff. Subsequently, the mortgagee can request the court to appoint a notary to organize a public auction to sell the property and to thereafter distribute the proceeds amongst the creditors. Alternatively, it is also possible to file a petition to organize a private sale of the immovable property in which case the judge will ascertain that the immovable property is sold at a fair market value.

In principle, the mortgagee's right to sell the property will be suspended as soon as the mortgagor has filed for judicial reorganisation proceedings or a court supervised transfer of the business (and during such restructuring proceedings). Likewise, the mortgagee's right to sell the property will also be suspended when the mortgagor has been declared bankrupt. In such case, it will be up to the bankruptcy trustee of the mortgagor to sell the immovable property. The first ranked mortgagee will however be entitled to sell the property, but only after the bankruptcy trustee has filed its first record of verification of creditors' claims (in principle +/- 2 months after the opening of the bankruptcy proceedings). Whilst the first ranked mortgage disposes of a competing power in this regard, it is a common practice to allow the trustee to continue the sale.

Pledge

Contrary to the mortgagee, a pledgee has in principle a right to immediately enforce the pledge upon default of the debtor. For most pledges, this requires the pledgee to first send a notice of default to the debtor and, as the case might be, to the third party pledgor or any other third party with competing rights over the goods. If the default is not cured within ten days, the pledgee can pursue the enforcement even if he does not dispose of an enforceable title on the merits of the claim. However, if the pledgor is a consumer, the pledgee needs to be authorized first by the court to enforce the pledge. Subject to certain conditions, the pledgee can enforce the goods by either selling them, appropriating them or (albeit uncommon) by renting them. The enforcement occurs at the risk of the pledgee who cannot limit or exclude its liability in this regard. If the proceeds of the enforcement exceed the value of the secured claim, the balance must be returned to the pledgor.

The pledgee's right to sell the encumbered goods will be suspended as soon as the pledgor has filed for judicial reorganisation proceedings or a court supervised transfer of the business (and during such restructuring proceedings). Likewise, the pledgee's right to sell the goods will also be suspended when the pledgor has been declared bankrupt, but only until the trustee has filed its first record of verification of creditors' claims (in principle +/- 2 months after the opening of the bankruptcy proceedings). The trustee can however request the court to order a further suspension of the enforcement rights of the secured creditor.

Pledged claims

Unless otherwise agreed, the pledgee is authorized to request payment from the debtor of the pledged claim even when the secured claim is not yet due. If the amount of the pledged claim paid by the debtor exceeds the value of the secured claim, the balance must be returned to the pledgor.

Particularly pledged claims (i.e. not being part of a pledge on the business) can still be enforced by the pledgee during judicial reorganisation proceedings or a court supervised transfer of the business. By contrast, it is disputed whether the pledgee can still collect the payment of a pledged claim when the pledgor has been declared bankrupt.

Retention of title

If goods are sold subject to a retention of title clause, the seller can reclaim the possession thereof when the buyer is in default. When the latter refuses to voluntarily return the goods, the seller should seek for a court order to compel the buyer to return the goods. As this is litigation on the merits, it might take some time before the seller effectively obtains the order. If there is a risk that the buyer disposes of the assets in the meantime, the seller can request for a specific ex parte order to secure the recovery of the goods through a seizure measure. It should also be noted that quite often, the buyer already resold the goods within the ordinary course of its business to a third party in good faith. In such case and provided that the third party did not yet settle its debts to the buyer, the retention of title will transfer from the goods to the claim of the buyer against the third party.

When the buyer is subject to judicial reorganisation proceedings or a court supervised transfer of the business, the seller will be prevented from claiming back his property. By contrast, during bankruptcy proceedings, the seller can recover his property if he has sent a notification to the bankruptcy trustee prior to the trustee's first record of verification of creditors' claims (in principle +/- 2 months after the opening of the bankruptcy proceedings).

Financial collateral

Upon the occurrence of an enforcement event and subject to the terms agreed, a creditor benefitting from financial collateral has the right to immediately enforce the collateral by selling or by appropriating the financial assets (cfr. the EU Collateral Directive). The creditor does not need to have an enforceable title. These enforcement rights are in principle not affected by restructuring or insolvency proceedings of the collateral provider.

3. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?

0. Introduction and overview of procedures

By the Act of 7 June 2023 the Belgian legislator has finally transposed the 2019/1023 EU Directive on restructuring and insolvency. The new rules well enter into force on 1 September 2023. Whilst Belgian law already provided for several preventive restructuring and rescue procedures, the new rules have introduced several new concepts and tools. The most important schemes that will be available as from 1 September 2023 are:

1. An out of court amicable agreement
2. Public judicial reorganisation proceedings allowing the debtor to enter into :
    - an amicable agreement with at least one creditor
    - a collective agreement with all the creditors and, when appropriate, the equity-holders. Different rules apply to SME's on the one hand and larger companies on the other hand.
3. Private judicial reorganisation proceedings with a view to enter into :
    - an amicable agreement with at least one creditor
    - a collective agreement with all or part of the creditors and, when appropriate, the equity-holders
4. A court supervised transfer of all or part of the business' activities
5. A private preparation of a transfer of all or part of the assets and activities, prior to the filing for bankruptcy ("pre-pack")

1. Out of court amicable agreement

When a debtor has executed an (out of court) amicable agreement with at least one creditor about the settlement of the relevant debt(s), the parties to such agreement can request the president of the business court to declare the agreement enforceable. This has certain benefits, most notably that the agreement will be protected to a large extent against claw back actions in case of a subsequent bankruptcy of the debtor (see question 12). The court may only refuse to declare the agreement enforceable when the debtor clearly has no economic viability anymore or when the agreement has detrimental effects on the rights of third parties on certain assets. The agreement will not be disclosed to third parties unless the debtor expressly consents to it.

2. Pubic judicial reorganisation proceedings

When its continuity of a business is in danger, the debtor can file first of all for public judicial reorganisation proceedings. When the proceedings are opened, (most) enforcement rights of the creditors (with a claim existing on the day of the opening of the proceedings) will be suspended to allow the debtor – who fully remains in possession of its business – to restructure its business according to one of the schemes provided for in the law. The proceedings will initially be opened for a maximum term of four months, but this term is renewable to a maximum of twelve months.

First, the debtor might execute an amicable agreement with at least one creditor(s) to repay the relevant debt(s). It is to a large extent subject to the same rules as the out of court amicable agreement, but in this case (i) the court may also impose repayment terms on dissenting creditors and (ii) the court decision ratifying the amicable agreement and/or imposing payment terms is also made public. Waivers of debts resulting from in-court amicable agreements will benefit from certain tax exemptions.

The second scheme is the collective agreement, which requires the debtor to draft a reorganisation plan containing amongst others a proposal for (partial) reimbursement of all creditors within a term of maximum five years. The rules resulting from the 2019/1023 EU Directive have been mainly incorporated vis-à-vis reorganisation plans filed by larger companies. For SME's, the old rules, which are slightly simpler, have largely remained applicable. For instance, whilst a reorganisation plan of an SME may divide creditors into different classes, the vote by the creditors is organized in globo and not per class. SME's can however decide to

make use of the rules applicable to large companies. After approval of the reorganisation plan by the creditors, it must be ratified by the court. The applicable rules are again different in function of the question whether the debtor is a SME or a large company.

3. Private judicial reorganisation proceedings

Alternatively, a debtor can also apply for private judicial reorganisation proceedings. The opening of these proceedings is not made public and does not affect the creditors' enforcement rights. However, when private reorganisation proceedings are opened, the president of the business court will appoint a restructuring expert. This latter person might request the president of the business court to order a stay of enforcement actions in respect of one or more specific creditors.

When the debtor enters into an amicable agreement, it is to a large extent subject to the same rules as the amicable agreement entered into during public reorganisation proceedings, but in this case the court decision ratifying the amicable agreement and/or imposing payment terms is not made public.

When the debtor intends to enter into a collective agreement with all or part of his creditors, the creditors will adopt it and the court will subsequently ratify it according to more or less the same rules applicable to collective agreements entered into during public reorganisation proceedings. The judgment ratifying the collective agreement will however not be made public.

4. Court supervised transfer of all or part of the business' activities

A debtor might also opt for a court supervised transfer of all or part of the business' activities (in certain specific cases, the court can order these proceedings upon request of specific third parties). These are also public proceedings during which the creditors' enforcement rights will be suspended. In such case, the court will appoint a liquidation expert who will be responsible to organize the sales process by drafting a sales memorandum, setting up a data-room, inviting potential buyers to perform a mini due diligence, etc. to attract a maximum of offers from potential buyers. Subsequently, the liquidation expert will ask the court to authorize the transfer of the business of the debtor to the party who has submitted the best offer.

5. Private preparation of a transfer of all or part of the assets and activities, prior to the filing for bankruptcy ("pre-packed sale")

Lastly, a debtor who is in a state of bankruptcy, can request the court, prior to being declared bankrupt, to prepare a transfer of all or part of the assets and activities. The debtor should demonstrate that such a private preparation of transfer will facilitate the subsequent liquidation thereby increasing the amount available to creditors and retaining a maximum of employment. The court will then appoint a liquidation expert for an initial maximum term of thirty days. The decision is not made public. In principle, the liquidation expert will be appointed as bankruptcy trustee in the subsequent bankruptcy proceedings.

4. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

A debtor subject to judicial reorganisation proceedings or a court supervised transfer of the business can still obtain new financing and can provide new collateral to secure such financing. If shortly after the termination of such restructuring proceedings the debtor is declared bankrupt or is wounded up, the new financing can be considered as a preferential debt of the insolvency assets in those insolvency proceedings. Preferential debts of the insolvency assets can also be settled from the proceeds of secured assets if the preferential creditor proves that its claim results from a performance during the judicial reorganisation proceedings or during the court supervised transfer of the business which allowed the preservation of the secured assets.

5. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

Not as a general rule, but certain exceptions apply in respect of:

- personal guarantees provided by natural persons, free of charge; and
- the spouse or legal cohabitant when the debtor is a natural person.

6. How do creditors organize themselves in these proceedings? Are advisory fees covered by the debtor and to what extent?

The concept of creditor committees in restructuring proceedings does not exist under Belgian law. Creditors can, however, request the court to appoint a mandatary or administrator to also protect their interests when they

are at stake. The fees of those mandataries or administrators should in principle be borne by the debtor.

7. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency proceedings upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

A business that ceased to pay its due debts on a permanent basis and that does no longer enjoy any credit from its (main) creditors, is in a state of bankruptcy. When both conditions are met, the directors are obliged to file for the company's bankruptcy within one month. Failure to do so might result in personal liability of the directors, both at a civil and criminal level. The one-month term is however suspended if the debtor files for judicial reorganisation proceedings or for a court supervised transfer of the business. In principle, the bankruptcy filing by the business should be made electronically via the Central Solvency Register (REGSOL) via www.regsol.be.

It should also be noted that the 2017 insolvency code has drastically extended the definition of persons and organisations who qualify as a business. It now includes (i) all natural persons exercising a professional activity on an independent basis and (ii) all (non-public) legal persons (even non-profit organisations), and (iii) any organisation without legal personality unless it operates on a non-profit basis.

8. What insolvency proceedings are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

The main insolvency proceedings for businesses are bankruptcy proceedings and liquidation proceedings.

When bankruptcy proceedings are opened, the Business court appoints (i) a bankruptcy trustee to secure, manage and liquidate the assets of the bankrupt estate and (ii) a judge commissioner to supervise the management and liquidation of the assets by the bankruptcy trustee. By operation of law, directors or natural persons of a bankrupt business lose their legal power to represent the bankrupt estate or to dispose of the assets thereof. The bankruptcy trustee is also responsible to distribute between the creditors the proceeds from the liquidation of assets. Bankruptcy proceedings typically last 1 to 3 years.

For companies, liquidation proceedings can also be used as an alternative for bankruptcy proceedings, even if the estate is deficient. It requires however a (tacit) approval of the main creditors. Liquidation proceedings can be opened following a decision of the shareholders to wind up the company, following a court winding-up order or by operation of law.

An insolvent business can also still file for reorganisation proceedings or for a court supervised transfer of the business.

9. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

Legal proceedings

When bankruptcy proceedings are opened, the bankrupt estate should be (further) represented by the bankruptcy trustee in all pending and new legal proceedings. Moreover, proceedings in which a monetary claim is pursued against a debtor who is declared bankrupt pending those proceedings are suspended by operation of law. The claimant should first file a claim in the bankrupt estate. If the bankruptcy trustee accepts the claim, the proceedings against the bankrupt estate will no longer have any relevance. If the bankruptcy trustee disputes the claim, the bankruptcy trustee is presumed to resume the pending proceedings, at least in respect of the disputed part.

Enforcement of creditor's claims

The opening of bankruptcy proceedings will suspend the enforcement rights of the creditors. However, if the enforcement is already in an advanced stage, it can in principle continue for the account of the bankrupt estate.

All creditors will be invited to file their claim in the bankrupt estate. Subsequently the bankruptcy trustee will either accept or dispute the claims in its procès-verbal of verification of claims.

After the filing of the first procès-verbal by the bankruptcy trustee, creditors with a security interest over movable property can again enforce the collateralized assets, but the bankruptcy trustee can request the court to further suspend such creditor's enforcement rights.

Likewise, the creditor benefitting from the first raking mortgage can enforce the collateralized immovable property after the filing of the first procès-verbal by the bankruptcy trustee.

10. How do the creditors, and more generally any affected parties, proceed in such proceedings? What are the requirements and forms governing the adoption of any reorgnisation plan (if any)?

The aim of insolvency proceedings is to liquidate the assets and subsequently distribute the cash among the creditors, trough the bankruptcy trustee as a court mandatary acting in the interest of the creditors. Hence, most creditors will be rather inactive and await the outcome of the initiatives taken by the bankruptcy trustee. As a bankrupt company will be wounded-up upon termination of the bankruptcy proceedings and as bankrupt natural persons will in principle benefit from a full release of their debts (fresh start), reorganisation plans are not adopted during insolvency proceedings.

11. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities, DIP financing)? Could the claims of any class of creditor be subordinated (e.g. recognition of subordination agreement)?

A distinction should be made between creditors "of" the estate and creditors "in" the estate.

The first group covers all debts the bankruptcy trustee has made or should have made to properly manage the bankrupt estate. It also covers all debts resulting from services provided during preceding judicial reorganisation proceedings or during a court supervised transfer of the business. All those debts should be paid by priority over the other debts. This might also include DIP financing provided to the debtor during the restructuring proceedings.

The second group of creditors in the bankrupt estate consists of three subcategories (in order of priority):

- creditors with a privilege or security interest on specific assets: those creditors have preferential rights on the sales proceeds of those assets (e.g. holders of a mortgage or a pledge). Debts of the estate (the first group) can also be settled from the proceeds of secured assets, if the creditor proves that its claims results from a performance which allowed the preservation of the secured assets;
- creditors with a privilege on all movable resp. immovable goods: those creditors will be next in line to receive the proceeds of the assets (e.g. the tax authorities, social security authorities and employees);
- non-privileged creditors.

If the proceeds of enforcement of the secured assets prove to be insufficient to repay the claims of the preferred creditors, those creditors become unsecured creditors in respect of the balance of their claim.

The concept of equitable subordination is not known under Belgian law.

12. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

First, the bankruptcy trustee can challenge any fraudulent transactions made to the detriment of the creditors regardless of when they occurred (actio pauliana).

Secondly, Belgian bankruptcy law also provides for specific claw back actions to allow the bankruptcy trustee to challenge certain transactions occurred during the hardening period. This is the period prior to the opening of the bankruptcy proceedings during which the bankruptcy conditions were already met. It requires a specific court order to set back that date. In principle, the date cannot be set back for more than six months compared to the date of the opening of the bankruptcy proceedings. Subsequently, the bankruptcy trustee can challenge the following transactions when they took place during the hardening period:

- gifts or transactions at no or at undervalue;
- all payments, in cash or in kind, of undue debts;

- granting of security in respect of pre-existing debts;
- all payments of due debts, if the creditor knew that the bankrupt conditions of the debtor were already met.

The latter three transactions are however protected against claw back action initiated by a bankruptcy trustee, if the transactions were part of an amicable agreement ratified by a court (see question 3).

13. How existing contracts are treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

Restructuring proceedings

As a general rule, the opening of judicial reorganisation proceedings or a court supervised transfer of the business does not affect the contractual rights of the parties. It is, however, not allowed to unilaterally terminate existing contracts or to change the modalities thereof, merely because the other party filed a petition for such restructuring proceedings (even if such a right has been provided for in the contract). In respect of other defaults existing at the time of the opening of the reorganisation proceedings, a creditor is still entitled to terminate the contract, but the debtor has a right to cure such defaults within fifteen days upon receipt of the notice of default.

If a contract is terminated during the reorganisation proceedings or during a court supervised transfer of the business, and such termination results in an obligation to return goods, the creditor can claim back the property of its goods which are still in the possession of the debtor (for instance, the lessee should give back the goods to the lessor after the termination of the lease contract). The situation is however different for a creditor benefitting from a retention of title. As in such case the ownership rights rather served as security for the claim of the creditor, a creditor will not be allowed to claim back the property of its goods as this will be considered as a forbidden enforcement.

Secondly, if it is deemed necessary for the restructuring, a debtor may unilaterally decide to suspend the performance of certain contractual obligations for the duration of the restructuring proceedings. In such case, the other party might also suspend its contractual performance.

Set-off pursuant to a netting clause is still allowed but subject to certain restrictions.

Bankruptcy proceedings

In absence of a contractual clause to that end, the opening of the bankruptcy proceedings will not automatically terminate existing agreements. It is up to the bankruptcy trustee to decide promptly after the opening of the proceedings whether he will perform the contract or not. He will only be entitled to unilaterally terminate the contract if it is deemed strictly necessary for the management of the bankrupt estate and insofar it does not affect any rights in rem which are enforceable against the bankrupt estate. The other contractual party can also request the bankruptcy trustee to take a decision as to the performance of the contract. If the bankruptcy trustee does not respond within fifteen days, the contract will be considered terminated by operation of law.

A retention of title clause is not affected by bankruptcy proceedings, but the creditor should notify the bankruptcy trustee of its will to enforce the clause, prior to the date of the filing of the first PV of verification of claims by the bankruptcy trustee.

Set-off pursuant to a netting clause is still allowed but subject to certain restrictions.

14. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets “free and clear” of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

Restructuring proceedings

When assets are transferred as part of a court supervised sale of the business, the assets will be transferred free and clear of any encumbrances, as the rights of the creditors are transferred to the purchase price (when immovable property is sold, the intervention of a notary is necessary to release the mortgage). The creditors’ consent is not required. Nevertheless, creditors benefitting from a registered security over movable property, as well as creditors benefitting from a registered security or who have levied an attachment over immovable property, need to be summoned to the court hearing deciding on the transfer of the business, to

allow those creditors to give comments on the intended transfer of the secured assets.

Bankruptcy proceedings

A bankruptcy trustee is entitled to sell, without the creditors' consent, all the assets belonging to the bankrupt estate free and clear of any encumbrances. Specific rules apply in respect of a sale of immovable property. Given the fact that certain secured creditors have (subject to certain conditions) a competing right to sell the secured assets (see question 2), a bankruptcy trustee will in principle ensure that he has the (tacit) agreement of the secured creditors when he is selling secured assets, to avoid any disputes afterwards.

Credit bidding is allowed, but very uncommon in practice.

A specific procedure to privately prepare a transfer of all or part of the assets and activities, prior to the filing for bankruptcy (pre-packed sale) will be available in Belgium as from 1 September 2023 (see question 3).

15. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor and if so can they be covered by insurances?

A debtor is obliged to file for bankruptcy within one month after the conditions for bankruptcy have been met. Failure to do so may trigger civil and/or criminal liabilities for directors of the debtor. For directors of a distressed company, it is therefore important to properly record and justify any decision to (temporarily) continue the business.

The new insolvency code introduced the concept of wrongful trading. If the debts exceed the proceeds of the bankrupt estate, the bankruptcy trustee can initiate a claim against the current or former directors or other persons who have de facto exercised the powers of directors, to hold them jointly and personally liable for all or part of the debts of the bankrupt estate. To be successful, the bankruptcy trustee must prove that at the time the defendant exercised those powers, (i) he knew or should have known that there was no reasonable and obvious perspective of preserving the business and of avoiding bankruptcy and (ii) he failed to act as can be expected from a reasonably prudent and diligent director in the same circumstances.

Subject to certain conditions, directors can also be held jointly and personally liable for the unpaid social security contributions, tax or VAT.

It should also be noted that the new company code has introduced liability caps for directors. The liability of directors will be capped at EUR 250,000.00, EUR 1,000,000.00, EUR 3,000,000.00, or EUR 12,000,000.00 depending on the turnover and assets of the company. The cap will not apply in the event of fraud, gross negligence, or repetitive minor misconduct or in relation to the abovementioned liability for unpaid social security, tax or VAT.

D&O insurance policies often exclude any liability following from a late bankruptcy filing.

16. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions? In which context could the liability of the directors be sought?

Restructuring or insolvency proceedings do not release directors from liability for previous actions and decisions. Post-bankruptcy litigation against directors initiated by the bankruptcy trustee or other interested parties (most notably creditors) is a common practice in Belgium.

17. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

Any judgment opening insolvency proceedings handed down by a court of another EU Member State which has jurisdiction pursuant to the 2015 EU Insolvency Regulation shall be recognised in Belgium without the need for separate exequatur proceedings pursuant to the principles of the same Regulation.

Foreign insolvency court decisions not covered by the Regulation (EC) 2015/848 may require separate exequatur proceedings to be recognized in Belgium.

Belgium has signed but did not ratify the UNCITRAL Model Law on cross-border insolvency. There are no plans for its ratification in the near future.

18. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

We are not aware of any published case law where this has been challenged.

19. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions? Which country does your jurisdiction have the most cross-border problems with?

Belgian insolvency courts have jurisdiction to open (main) insolvency proceedings when the centre of the debtor's main interests (COMI) is situated in Belgium. The centre of main interests is the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office is presumed to be the centre of its main interests in the absence of proof to the contrary.

Those rules, originating from the 2015 Insolvency Regulation, were also incorporated in the Belgian rules of private international law. Consequently, it also applies to a debtor incorporated in jurisdictions of non-EU Member States.

20. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders? For EU countries only: Have there been any changes in the consideration granted to groups of companies following the transposition of Directive 2019/1023?

If a Belgian business court has jurisdiction to open insolvency proceedings in respect of a member of a group, it also has jurisdiction to open insolvency proceedings in respect of the other members of the group whose centre of main interests is located in the judicial area of another Belgian business court. In such case, the same insolvency practitioner can be appointed for all members of the group.

21. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

Belgian law complies to a large extent with the standards set in the UNCITRAL Model Law on Enterprise Group Insolvency, given the direct applicability of the EU Insolvency Regulation 2015/848 (containing rules regarding insolvency proceedings of members of a group of companies) and several new concepts introduced in our national insolvency code in 2017.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

The Belgian Act to transpose the EU Restructuring and Second Chance Directive 2019/1023 has been adopted on 7 June 2023 and will enter into force on 1 September 2023.

23. Is your jurisdiction debtor or creditor friendly and was it always the case?

Belgian insolvency law is highly regulated and strikes a good balance between the rights of debtors and creditors.

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the State play in relation to a distressed business (e.g. availability of state support)?

In the context of insolvency, the Belgian legislator has granted strong rights for employees, FPS FINANCE (treasury department) and the National Social Security office. Labour unions and employee representatives have an increased say in larger insolvency proceedings.

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

Belgium has made extensive progress in recent years in making the restructuring and insolvency procedures more efficient, modern and effective. Greatest barriers at the moment are the duration of insolvency proceedings and possible inconsistencies between the new laws.

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