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Restructuring Across Borders

Belgium:

Corporate restructuring and insolvency procedures | March 2020

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Contents

Introduction

The five principal restructuring and insolvency procedures for companies under Belgian law are:

- bankruptcy (*la faillite/het faillissement)*;
- judicial reorganisation proceedings *(la réorganisation judiciaire/de gerechtelijke reorganisatie*);
- the voluntary (out-of-court) winding-up of a company (*la liquidation volontaire/de vrijwillige vereffening*);
- the judicial winding-up of a company (*la liquidation judiciaire/de gerechtelijke vereffening*); and
- the appointment of a provisional administrator as provided for by Article XX.32 of the Belgian Insolvency Law (*le dessaisissement provisoire de la gestion visé à l'article XX.32 du Code de droit économique/de voorlopige ontneming van beheer, als bedoel in artikel XX.32 van het Wetboek van economisch recht*).

Bankruptcy *(la faillite / het faillissement)*

The **Belgian Insolvency Law** (Book XX of the Code of Economic Law) governs the bankruptcy of enterprises, which is a liquidation procedure for companies that have ceased paying their debts and are unable to obtain credit.

This procedure involves the Business Court appointing a bankruptcy trustee (*curateur/curator*) to:

– take control of the company;

– collect and realise its assets, including the initiation of proceedings to maximise the company's assets (eg liability proceedings); and

– distribute the proceeds of the assets among creditors based on the legal ranking of each creditor.

The bankruptcy procedure's aim is to liquidate the assets of the bankrupt company. The bankruptcy will essentially lead to the company's business being dismantled.

Judicial reorganisation *(la réorganisation judiciaire / de gerechtelijke reorganisatie)*

The Belgian Insolvency Law contains various reorganisation measures that are aimed at rescuing a business in financial difficulty. Consequent to the introduction of new judicial reorganisation proceedings in 2009 the continuation and rescue of a business has become a real alternative to bankruptcy. Accordingly, when faced with a decision on whether to reorganise a company or place it into bankruptcy, the question is not whether the debtor is insolvent, but rather, whether the continuity of the debtor is threatened in the short or medium term and, whether it is possible to use a judicial reorganisation proceeding to rescue the company.

The Belgian Insolvency Law provides for the following two restructuring procedures:

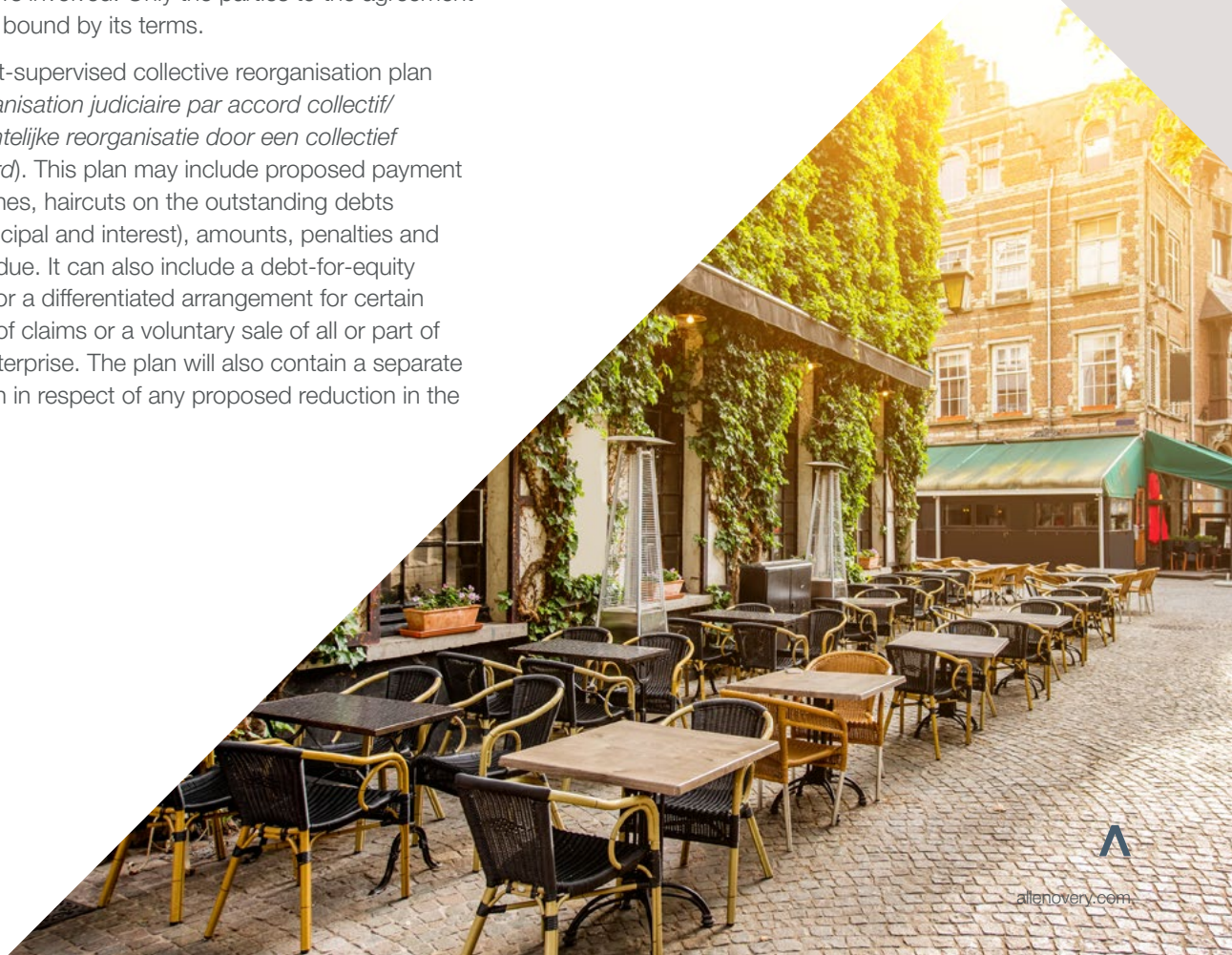
– an "out-of-court" consensual agreement between the indebted company and at least two of its creditors (*accord amiable/minnelijk akkoord*). To the extent that the agreement: (i) has been agreed upon for the purpose of remedying the company's financial situation or reorganising the business; (ii) contains a confidentiality clause; (iii) contains a severability clause; and (iv) has been filed with the clerk's office of the Business Court, the "out-of-court" consensual agreement is protected against certain claw-back provisions that could potentially apply in the event of a later bankruptcy of the debtor company. Furthermore, the court may order that the claims listed in the

"out-of-court" consensual agreement are enforceable for the benefit of the creditors that have entered into the agreement. Such a court order ensures that if on a later date the debtor fails to fulfil its contractual obligations under the "out-of-court" consensual agreement (ie fails to pay the creditors) a creditor can (without further court involvement) take any enforcement measures necessary (eg instructing a bailiff to seize the debtor's assets).

– a "court-supervised" or "judicial" reorganisation under which the indebted company is granted a temporary suspension period (moratorium) during which enforcement measures against the company's assets (for debts incurred before the opening of the judicial reorganisation proceedings) will be suspended. During the suspension period, the debtor company cannot be declared bankrupt or be liquidated. The following three types of court-supervised reorganisations are available:

(i) a court-supervised consensual agreement (*réorganisation judiciaire par accord amiable/ gerechtelijke reorganisatie door een minnelijk akkoord*) with at least two of the debtor's creditors. The agreement requires unanimity among the creditors involved. Only the parties to the agreement will be bound by its terms.

(ii) a court-supervised collective reorganisation plan (*réorganisation judiciaire par accord collectif/ gerechtelijke reorganisatie door een collectief akkoord*). This plan may include proposed payment deadlines, haircuts on the outstanding debts (in principal and interest), amounts, penalties and costs due. It can also include a debt-for-equity swap or a differentiated arrangement for certain types of claims or a voluntary sale of all or part of the enterprise. The plan will also contain a separate section in respect of any proposed reduction in the



workforce. The plan is adopted if a "double majority" of creditors vote in favour of the plan (this double majority requires that the plan is approved by: (a) the majority in number of the creditors; and (b) creditors representing at least half of the sum of the outstanding debts in principal). The plan must be approved by the Business Court and must be carried out within five years from its formal approval ("homologation") by the Business Court. Once approved, the reorganisation plan is binding on all creditors including those creditors who have voted against the plan.

(iii) a court-supervised sale of all or part of the enterprise (*réorganisation judiciaire par transfert sous autorité de justice/gerechtelijke reorganisatie door overdracht onder gerechtelijk gezag*). A transfer may take place with or without the approval of the debtor and is binding on all creditors (subject to certain exceptions). Upon the request of the public prosecutor, a creditor, or any third party interested in buying all or part of the business, the Business Court may in certain circumstances order a forced and court-supervised transfer, for example when judicial reorganisation proceedings have already been initiated or when the debtor is in a state of bankruptcy (ie when the conditions for bankruptcy have been met). An "agent of justice" specifically appointed by the Business Court will manage the sale and the transfer of the assets. The appointment of an agent of justice divests the debtor's management of their powers, as far as the sales process is concerned. The Belgian Insolvency Law sets out the rules for distributions of the sale proceeds. However, if the proceeds of sale are insufficient to pay off all creditors, the bankruptcy procedure must be requested.

As the various activities of an enterprise may need to be reorganised in different ways, an indebted company may file a petition specifying multiple objectives or seeking the approval of a reorganisation plan with multiple aspects.

If, during a court-supervised reorganisation process, it becomes apparent that the chosen objectives are not achievable, the indebted company may, under the guise of the same judicial reorganisation, switch to another type of reorganisation.

The judicial reorganisation proceedings operate on a sliding scale, ie a company may apply to switch from: (i) a court-supervised consensual agreement to either a court-supervised collective reorganisation or a court-supervised sale of all or part of the enterprise; or (ii) a court-supervised collective reorganisation to a court-supervised sale of all or part of the enterprise.

If the company ceases to satisfy the conditions for judicial reorganisation, it may be declared bankrupt or dissolved by the Business Court.

Voluntary winding-up of a company *(la liquidation volontaire / de vrijwillige vereffening)*

The Belgian Code of Companies and Associations (the **BCCA**) states that a general meeting of the indebted company's shareholders may resolve to wind up the company voluntarily and appoint a liquidator (*liquidateur/vereffenaar*) to oversee the disposal of the company's assets. The approval of the Business Court for the appointment of a liquidator is not required unless the company's assets are insufficient to cover the outstanding debts. Such approval by the Business Court is also not required if all outstanding debts are debts to the company's shareholders and all shareholders agree on the liquidator's appointment in writing. Any interested third party may petition the Business Court to withdraw the appointment of the liquidator and appoint another liquidator.

The Business Court is not required to be involved in the liquidation plan unless the company's assets are insufficient to cover the outstanding debts.

The BCCA also states that for companies incorporated as a private limited liability company (*besloten vennootschap/société à responsabilité limitée) or as a limited partnership (commanditaire vennootschap/société en commandite*), a general meeting of the shareholders must be convened to vote on a resolution proposing the winding-up of the company: (i) if the company's net assets will or have become negative; or (ii) if the company's management decides on the basis of reasonably foreseeable developments that it is uncertain whether the company will be able to pay its debts for at least the next 12 months.

The same applies to companies incorporated as a limited liability company (*naamloze vennootschap/ société anonyme*), when the company's net assets fall below 50% of the share capital.

Judicial winding-up of a company
(la liquidation judiciaire / de gerechtelijke vereffening)

The BCCA provides for the judicial winding-up of a company if:

– the company has not filed annual accounts at the latest seven months after the date of closure of the financial year in question, in which case, any interested party, the public prosecutor or the "chamber for companies in difficulties" at the Business Court may seek a court order for the company to be wound up.

– the company has been incorporated as a limited liability company (*naamloze vennootschap/société anonyme*) and its net assets have fallen below the minimum specified by the BCCA, in which case, any interested party or public prosecutor may seek a court order for the company to be wound up.

– the circumstances provided for in the BCCA make the normal continuation of the company's business impossible, in which case, a shareholder of the company may seek a court order for the company to be wound up; and

– the "chamber for companies in difficulties" at the Business Court has notified the Business Court of the occurrence of any one of the following circumstances: (i) the company has *ex officio* been removed from the company register of the Crossroads Bank for Enterprises; (ii) the company has not appeared before the "chamber for companies in difficulties" at the Business Court, in spite of having received two writs of summons; or (iii) the directors or managers of the company do not have the basic management skills or do not possess the professional competence required for the exercise of its activity as required by applicable law.

Appointment of a provisional administrator as provided for by Article XX.32 of the Belgian Insolvency Law

Article XX.32 of the Belgian Insolvency Law states that the president of the Business Court may, on his/her own initiative or, on any interested party's request (eg a creditor), appoint a provisional administrator if:

– there are significant and consistent indications that the indebted company satisfies the conditions for bankruptcy; and

– it is absolutely necessary to appoint a provisional administrator, ie there is a danger that certain assets may disappear.

The provisional administrator will, in principle, take over control of the indebted company's management and its assets. The provisional administrator may initiate judicial reorganisation proceedings, or a bankruptcy procedure against the indebted company, or may seek a court order for the company to be wound up.

The provisional administrator will lose his/her powers if:

– the bankruptcy procedure, judicial reorganisation proceedings or proceedings involving a judicial winding-up have not been initiated (by an interested party or the provisional administrator itself) against the indebted company within 21 days of the provisional administrator's appointment; or

– there is no final judgment on bankruptcy, judicial reorganisation, or no judicial winding-up judgment within four months of the provisional administrator's appointment.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings, but secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Bankruptcy (*la faillite/het faillissement*), judicial reorganisation proceedings (*la réorganisation judiciaire/de gerechtelijke reorganisatie*), the voluntary winding-up of a company (*la liquidation volontaire/de vrijwillige vereffening*), the judicial winding-up of a company (*la liquidation judiciaire/de gerechtelijke vereffening*) and the appointment of a provisional administrator as provided for by Article 8 of the Bankruptcy Act (now Article XX.32 of the Belgian Insolvency Law) (*le dessaisissement provisoire visé à l'article 8 de la loi sur les faillites/de voorlopige ontneming van beheer, bepaald in artikel 8 van de faillissementswet*) were available as main proceedings under the Original Regulation. It should be noted that not all types of judicial reorganisation proceedings qualified as main proceedings under the Original Regulation. An out-of-court consensual agreement and a court-supervised consensual agreement were not available as main proceedings.

Bankruptcy (*la faillite/het faillissement*), the voluntary winding-up of a company (*la liquidation volontaire/de vrijwillige vereffening*), the judicial winding-up of a company (*la liquidation judiciaire/de gerechtelijke vereffening*) and court-supervised judicial reorganisation proceedings where the objective is the court-supervised sale of all or part of the enterprise (*réorganisation judiciaire par transfert sous autorité de justice/gerechtelijke reorganisatie door overdracht onder gerechtelijk gezag*) were also available as secondary proceedings under the Original Regulation.

Under the Recast Regulation, bankruptcy (*la faillite/het faillissement*), judicial reorganisation proceedings (*la réorganisation judiciaire/de gerechtelijke reorganisatie*), the voluntary winding-up of a company (*la liquidation volontaire/de vrijwillige vereffening*), the judicial winding-up of a company (*la liquidation judiciaire/de gerechtelijke vereffening*) and the appointment of a provisional administrator as provided for by Article XX.32 of the Belgian Insolvency Law (*le dessaisissement provisoire de la gestion visé à l'article XX.32 du Code de droit économique/de voorlopige ontneming van beheer, als bedoel in artikel XX.32 van het Wetboek van economisch recht*) are listed in Annex A. It should be noted that, in relation to judicial reorganisation proceedings, a court-supervised consensual agreement is included in Annex A of the Recast Regulation.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

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Further information

Developed by Allen & Overy's market-leading Restructuring group, Restructuring Across Borders is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please click **here**.

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