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Insolvency

Belgium
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Law and Practice

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1. Market Trends and Developments

1.1 The State of the Restructuring Market

The COVID-19 pandemic continues to have an important economic impact, which has resulted in companies facing financial difficulties and having to seek protection against creditors.

Temporary Protective Measures Resulting in Fewer Bankruptcies

These economic difficulties were anticipated by the Belgian governmental authorities, who have introduced several protective measures since March 2020, including the following:

- an automatic protection for Belgian companies affected by payment difficulties as a result of the COVID-19 pandemic and the measures taken in the context thereof (cfr. Royal Decrees of 24 April 2020 and 13 May 2020), which included, inter alia, legal suspension of payment, protection against enforcement measures by creditors, temporary suspension of the obligation to declare bankruptcy and favourable treatment of new credit. This protection ended on 17 June 2020, forcing Belgian businesses once again to resort to the regular insolvency proceedings of judicial reorganisation and bankruptcy;
- economic support by granting payment terms for tax and social security debts; and
- temporary unemployment schemes to reduce employment costs for companies.

Graydon numbers show that the number of bankruptcies of Belgian companies has decreased in 2020, with 30.3% in comparison to the same period in 2019 (source: https://graydon.be/pers/faillissementen-voor-achtste-maand-op-rij-gedaald), so the initiatives by the Belgian authorities seem to be working for the time being.

Nevertheless, an increase in judicial reorganisation and bankruptcy proceedings is expected in the coming months, as several protective measures have been phased out and new lockdown measures have been taken by the Belgian government as of 2 November 2020.

Anticipated Legal Reform Related to Restructuring

A draft law (dd. 10 June 2020) amending judicial reorganisation proceedings is currently being discussed by Belgian law-makers. The aim of this draft law is to make the existing proceedings of judicial reorganisation more accessible, especially for small and medium-sized companies. This is also a response of the Belgian legislators to the COVID-19 crisis and its economic impact.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

In Belgium, statutory restructuring and insolvency proceedings are governed by book XX of the Code of Economic Law.

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Under Belgian law there are two types of statutory insolvency proceedings:

- judicial reorganisation, which is a proceeding for a going concern. A judicial reorganisation can be by amicable agreement with two or more creditors, by a reorganisation plan or by court-supervised transfer of business; and
- bankruptcy, which is a liquidation proceeding.

Judicial reorganisations by amicable agreement or by reorganisation plan are strictly voluntary proceedings. Judicial reorganisations by court-supervised transfer of business and bankruptcy proceedings can be either voluntary or involuntary (on summons from an interested party (eg, creditor) or the public prosecutor's office).

All so-called undertakings/companies may be the subject of the above statutory insolvency proceedings, except for regulated sectors (see **2.6 Specific Statutory Restructuring and Insolvency Regimes**).

2.3 Obligation to Commence Formal Insolvency Proceedings

The management of a company is obliged to declare bankruptcy within one month of the bankruptcy conditions being met (Article XX.102 of the Code of Economic Law). Please see **2.5 Requirement for Insolvency** for an explanation of the bankruptcy conditions. If the management fails to respect this deadline, it may be liable vis-à-vis third parties for any increase in liabilities as a result of the late declaration.

Alternatively, the management may also submit a petition for judicial reorganisation, the effect of which is to suspend the obligation to file a declaration of bankruptcy for as long as the judicial reorganisation proceedings last. Evidently, this requires that the conditions for the commencement of judicial reorganisation proceedings are met (see **2.5 Requirement for Insolvency**).

2.4 Commencing Involuntary Proceedings

Creditors and the public prosecutor's office may petition for judicial reorganisation proceedings by court-supervised transfer of business and for bankruptcy proceedings. This is done by means of a writ of summons. The petition shall be granted by the court insofar as the respective conditions for the application of the proceedings are met (see **2.5 Requirement for Insolvency**).

Creditors and the public prosecutor's office may not petition for judicial reorganisation proceedings by amicable agreement or reorganisation plan, as these proceedings are strictly voluntary.

2.5 Requirement for Insolvency

"Insolvency" is required for both voluntary and involuntary insolvency proceedings.

The opening of judicial reorganisation proceedings requires that the continuity of the company is threatened, either immediately or in the long term (Article XX.45 of the Code of Economic Law). This must be proven by the company by means of financial records. The continuity of the company is legally presumed to be threatened when the losses of the company have reduced the net assets to less than half of the share capital.

A company is deemed bankrupt as soon as (i) it can no longer pay its debts which are due in the short term and (ii) it can no longer obtain credit from its institutional financial partners or creditors.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Specific Statutory Insolvency Regimes Applicable to Banks and Stockbroking Firms

EU banks and qualifying EU investment firms (so-called stockbroking firms in Belgium) are subject to the Bank Recovery and Resolution Directive (BRRD) as implemented in the Belgium Banking Act. The BRRD was adopted in 2014 as a response to the 2008 financial crisis and the "too big to fail" problem. It aims to prevent future crises as much as possible and to enhance the resilience of the financial system through the following means:

- mandatory recovery plans for banks and stockbroking firms, setting out measures to be taken for the restoration of their financial position following a significant deterioration; and
- resolution (restructuring) tools, which may be used by the authorities to intervene in a failing institution in time to ensure the continuity of its critical functions and to minimise the impact of a bank's or stockbroking firm's failure on the economy and financial system. The regime ensures that shareholders bear losses first and that creditors bear losses after shareholders. Authorities can also maintain uninterrupted access to deposits and payment transactions, and sell viable portions of the institution where appropriate.

Deposit and Securities Guarantee Schemes

Guarantee schemes ensuring compensation for depositors or investors in the insolvency of banks, investment firms, life insurance companies and management companies of AIFs and UCITS are available.

Settlement Finality in Payment and Securities Settlement Systems

Settlement finality aims to protect transactions in payment and securities settlement systems against certain consequences of insolvency, by providing for the irrevocability of transfer orders and netting if these orders are entered into a payment or securities settlement system before the opening of an insolvency procedure against a participant to that system (eg, a bank, central counterparty, clearing house).

Specific Insolvency Rules Applicable to Insurance and Reinsurance Companies

Pursuant to Belgian insurance legislation implementing the Solvency II Regulation, insurance companies must at all times hold assets that are free of all charges for an amount covering the liabilities to insurance creditors. The latter have an absolute priority to other creditors in the case of insolvency.

The opening of an insolvency procedure is preceded by an advice of the National Bank of Belgium (NBB). A dissolution and subsequent liquidation also require a prior advice from the NBB.

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

With the exception of individual agreements between a company and its creditor(s) outside of any legal proceedings, Belgian restructuring processes are limited to the statutory insolvency proceedings listed under **2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership**. There is no legal obligation to participate in consensual negotiations with creditor(s) before statutory insolvency proceedings are initiated.

Nevertheless, informal, consensual negotiations with creditors on payment terms are common but require the consent of each individual creditor concerned. In individual cases, the court may also allow payment terms, without the consent of the creditor(s) concerned.

Consensual restructuring with at least two creditors may also take the form of judicial reorganisation proceedings by amicable agreement. This option is often more attractive than fully out-of-court negotiations, as it allows the company to benefit from a statutory period of payment suspension during the negotiations. This way, the company is protected against enforcement measures by (other) creditors and the negotiations are more likely to succeed.

3.2 Consensual Restructuring and Workout Processes

As Belgian restructuring processes are limited to the statutory insolvency proceedings, there are no specific or typical consensual restructuring and workout processes.

3.3 New Money

Generally speaking, banks are reluctant to inject new money on an unsecured basis. In practice, new money often comes from shareholders, large suppliers or venture capital.

New money injected outside of statutory restructuring proceedings does not benefit from any super-priority. Contrarily, new money injected during statutory reorganisation proceedings does benefit from a super-priority in the event of subsequent bankruptcy (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings** and **6.10 Priority New Money**).

3.4 Duties on Creditors

As there are no out-of-court regulated restructuring processes, there are no specific duties that creditors must abide by other than the general duty to act in good faith.

However, creditors must take into consideration that certain out-of-court agreements may be called into question if the company is later declared bankrupt (see **11.1 Historical Transactions**).

3.5 Out-of-Court Financial Restructuring or Workout

Cram-down mechanisms are principally subject to the consent of the creditors, except in the case of statutory reorganisation proceedings.

Nevertheless, Belgian law-governed multi-lender credit agreements are mostly drafted based on the LMA standard models, which provide for a mechanism pursuant to which a (super-) majority of lenders (acting together with the agent of the obligors/borrowing group) is able to amend or waive, as the case may be, certain terms of such credit agreements. Such amendments or waivers are binding on all the parties to the relevant credit agreement, including any dissenting lender.

4. Secured Creditor Rights, Remedies and Priorities

4.1 Liens/Security

The securities or liens available under Belgian law for creditors are as follows:

- mortgage on immovable property;
- pledge on movable property, which may be either tangible or intangible property (eg, claims or intellectual property rights);
- retention of title; and
- lien.

4.2 Rights and Remedies

Secured creditors can exercise their securities (eg, mortgage, pledge, retention of title, lien) outside a statutory restructuring or insolvency process. They may also continue to exercise their security in the context of bankruptcy proceedings. On the contrary, during judicial reorganisation proceedings securities may not be exercised by secured creditors for debts incurred prior to the commencement of the reorganisation proceedings (Article XX.50 Code of Economic Law).

Secured creditors have no special rights to suspend or block judicial reorganisation or bankruptcy proceedings, except on the basis of the general principle of good faith. They may also request the appointment of an interim administrator, director or mandatary to supervise the management of the company. Secured claims are particularly protected (see **4.3 Special Procedural Protections and Rights**).

4.3 Special Procedural Protections and Rights

Secured creditors are entitled to special procedural protections in most statutory insolvency and restructuring proceedings.

Judicial Reorganisation Proceedings

- By amicable agreement: no special protection. Secured creditors' rights can only be affected with their consent, as is the case for ordinary creditors.
- By reorganisation plan: secured claims cannot be reduced, which is contrarily possible for claims of ordinary creditors. Payment thereof can only be deferred for 24 or 36 months (Article XX.74 Code of Economic Law).
- By court-supervised transfer: secured creditors shall be paid in priority from the proceeds of the sale of the assets.

Bankruptcy Proceedings

- Secured creditors may exercise their security.
- Secured creditors shall be paid in priority from the proceeds of the sale of the assets concerned.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

Unlike secured creditors, unsecured creditors do not benefit from special protections or priorities in statutory insolvency or restructuring proceedings.

Nevertheless, in judicial reorganisation by reorganisation plan proceedings, a distinction can be made between different categories of ordinary creditors insofar as this distinction can be objectively justified (eg, on the basis of the size of the debt – Article XX.73 of the Code of Economic Law). Certain categories of unsecured creditors may thus face greater debt reduction than other categories of unsecured creditors.

In addition, unsecured creditors will benefit from a super-priority for so-called "new debts" – ie, debts related to services rendered during the judicial reorganisation proceedings (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings**).

Unsecured creditors have no special rights during bankruptcy proceedings except for the aforementioned "new debts".

5.2 Unsecured Trade Creditors

Pre-existing unsecured trade debts are generally reduced in the context of judicial reorganisation by reorganisation plan proceedings.

Trade debts that have become due and payable during statutory reorganisation procedures benefit from a super-priority (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings**).

5.3 Rights and Remedies for Unsecured Creditors

Unsecured creditors cannot take enforcement measures during judicial reorganisation and bankruptcy proceedings.

Unsecured creditors have no special rights to suspend or block judicial reorganisation or bankruptcy proceedings, except on the basis of the general principle of good faith. They may also request the appointment of an interim administrator, director or mandatary to supervise the management of the company.

5.4 Pre-judgment Attachments

Pre-judgment attachments are not available under Belgian law.

Any pre-existing attachments are suspended from the moment statutory judicial reorganisation or bankruptcy proceedings are commenced. However, in some cases conservative attachments may retain their conservative character (Articles XX.50, XX.51 and XX.120 of the Code of Economic Law).

5.5 Priority Claims in Restructuring and Insolvency Proceedings

Certain claims benefit from special protection in statutory insolvency and restructuring proceedings, as follows:

- Employees' claims: may not be reduced in judicial reorganisation by reorganisation plan proceedings (Article XX.73 of the Code of Economic Law).
- Maintenance claims: may not be reduced in judicial reorganisation by reorganisation plan proceedings (Article XX.73 of the Code of Economic Law).
- So-called "new debts": debts related to services rendered during the judicial reorganisation proceedings benefit from a super-priority in subsequent bankruptcy proceedings. This includes services rendered by, inter alia, suppliers, employees, lawyers and administrators, as well as new money injected by banks.
- So-called "debts of the bankruptcy estate": debts incurred in the context of the bankruptcy proceedings (eg, trustee fees) shall be paid in priority to the unsecured and generally privileged creditors. However, special secured claims (eg, debts secured by a mortgage or pledge) shall always be paid first, thus also prior to the debts of the estate. The above-mentioned "new debts" will follow the same treatment as the debts of the estate.

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

6.1 Statutory Process for a Financial Restructuring/Reorganisation

Three Types of Statutory Reorganisation Proceedings

- Judicial reorganisation by amicable agreement with two or more creditors: an individual agreement is concluded with two or more creditors – the agreement shall be binding only on those creditors.
- Judicial reorganisation by reorganisation plan: a reorganisation plan is drafted, which is binding on all the company's existing creditors as soon as the majority of the voting creditors, representing the majority of the total indebtedness, have agreed to the plan. This includes creditors that did not participate in the vote, creditors of contested claims that are later recognised by a court, and creditors who are discovered after the approval of the reorganisation plan (although the claims of this last category are only paid after the reorganisation plan has reached its term). The reorganisation plan involves a rescheduling and/or reduction of the company's

unsecured debts over a maximum period of five years. Debt reduction is limited to 20% of the principal amounts of unsecured debts. Late payment interests and contractual indemnities may also be waived, but fines cannot. Secured creditors benefit from special protection (see **4.3 Special Procedural Protections and Rights**).
- Judicial reorganisation by court-supervised transfer of business: the assets/activities (or part thereof) of the company are sold to a third company, and the creditors are paid from the proceeds of this sale. Maintaining employment (as much as possible) is a key objective.

Common Characteristics of All Types of Statutory Reorganisation Proceedings
- Proceedings are initiated by means of a petition emanating from the company or a summons from an interested party or the public prosecutor's office.
- Creditors are not obliged to take up an active role in order to have their claim included. The company draws up the list of outstanding claims in accordance with its bookkeeping and informs each creditor individually. In judicial reorganisation by reorganisation plan or court-supervised transfer proceedings, creditors may object to the amount of their claim withheld by the company in court if they do not agree.
- The court exercises marginal control by means of homologation of the amicable agreement, the reorganisation plan and the transfer agreement. The court's discretion is limited to mostly formalistic elements or elements of public order.
- The proceedings are terminated by the court after homologation or realisation of the transfer of assets.
- An appeal may be lodged by a creditor against the decision to open the judicial reorganisation proceedings, as well as against the homologation of the reorganisation plan and the transfer agreement.
- The entire process usually takes between three and 12 months. There is no particular expedited procedure.

6.2 Position of the Company

The guiding principle of judicial reorganisation proceedings is "debtor in possession". The management of the company remains fully empowered to act, including maintaining the right to enter into new (credit) agreements, among others. However, under certain conditions (eg, if serious shortcomings can be attributed to the management of the company), a temporary mandatary may be appointed to supervise the management at the request of a creditor or the public prosecutor's office. The scope of the mandate of the temporary mandatary is determined by the court.

In reorganisation by court-supervised transfer proceedings, an administrator is appointed by the court to effectuate the sale of the assets. The management of the company is thus not in charge of the sale.

Judicial reorganisation proceedings automatically result in a period of suspension of payment, which in practice is usually three to six months. This period may be extended. During this period, the company is protected against enforcement measures by creditors as well as forced liquidation and bankruptcy.

Transactions at shareholders' level remain unaffected by judicial reorganisation proceedings.

6.3 Roles of Creditors

Reorganisation by Amicable Agreement
Only the creditors involved in this agreement are affected by it. The final agreement depends on their consent.

Reorganisation by Reorganisation Plan
Creditors are not involved in drafting the reorganisation plan; this task is entirely up to the company. The role of the creditors is mainly limited to, on the one hand, verifying and declaring their claims and, on the other hand, voting on the reorganisation plan. A double majority is required before the reorganisation plan is considered to be approved and binding on all creditors. The majority of the creditors present at the voting must agree to the plan, and these creditors must also represent the majority of the total indebtedness of the company (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**).

Reorganisation by Court-Supervised Transfer
The role of the creditors is limited to verifying and declaring their claims. They are not involved in the transfer of assets.

Information to Creditors
- Each individual creditor is informed by the company of the opening of the judicial reorganisation proceedings by reorganisation plan or court-supervised transfer and the withheld amount of their respective claim (Article XX.49 Code of Economic Law).
- During the proceedings, creditors may follow up on the steps taken in the proceedings via an online platform (RegSol).
- The judgments concerning the opening of the proceedings, the homologation of the agreements and the closure of the proceedings are published in the Belgian Official Gazette.

6.4 Claims of Dissenting Creditors

Judicial reorganisation by amicable agreement requires the consent of each creditor affected by the agreement.

In judicial reorganisation by reorganisation plan proceedings, a distinction in cram-down can be made between different cat-

egories of unsecured creditors insofar as this distinction can be objectively justified (eg, on the basis of the size of the debt – Article XX.73 of the Code of Economic Law).

Creditors can be affected by a reduction of claim without having agreed to it individually, if the reorganisation plan has been approved by a double majority of creditors (see **6.3 Roles of Creditors**).

6.5 Trading of Claims Against a Company

Creditors may assign their claims against a company undergoing statutory reorganisation in accordance with the general rules applicable to a transfer of claims. Types of a transfer and its effects remain the same as if there was no restructuring. This implies that the transfer will be opposable to the company-debtor only once the debtor has been notified of the transfer of the claim.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

Belgian statutory restructuring proceedings may not be used to reorganise a corporate group on a combined basis. Each company is treated separately.

6.7 Restrictions on a Company's Use of Its Assets

Pursuant to the principle of "debtor in possession", the management of the company remains fully empowered to act during proceedings of reorganisation, unless a temporary mandatory has been appointed to supervise the management (see **6.2 Position of the Company**). This includes any use of the company's assets. Nevertheless, the company must ensure that it acts in good faith and does not commit any abuse of law.

An exception applies to judicial reorganisation by court-supervised transfer proceedings, in which an administrator is appointed to realise the sale of the company's assets.

6.8 Asset Disposition and Related Procedures

In judicial reorganisation by court-supervised transfer proceedings, an administrator is appointed by the court to effectuate the sale of assets (Article XX.85 of the Code of Economic Law). The task of this administrator is to collect offers and assign the assets to the party with the best offer, whereby the continuity of all or part of the company's activity is an important element of assessment (Article XX.87 of the Code of Economic Law). In theory, this could also be a creditor.

If informal negotiations between the company and a third party took place prior to the judicial reorganisation proceedings, this third party will also be able to submit an offer for the purchase of the assets. However, the administrator is not obliged to select this offer. The company's management must therefore be careful during the preliminary negotiations, and should not make any formal promises to the interested third party.

If the transfer includes real estate, a notary will be appointed to carry out the notarial sale.

The proceeds from the sale of the assets will be distributed by the administrator among the creditors, with due observance of the respective priority rights and securities.

The acquirer's obligations are, in principle, limited to what is provided for in the transfer agreement. He or she will therefore not be obliged to pay any other claims or outstanding amounts due from the company.

6.9 Secured Creditor Liens and Security Arrangements

Judicial Reorganisation by Amicable Agreement or Reorganisation Plan

The enforcement rights of secured creditors are suspended during judicial reorganisation proceedings. After the court's homologation of the amicable agreement or the reorganisation plan, the securities may only be exercised by the secured creditors with respect to said agreements (eg, after the expiry of the payment deferral period).

Judicial Reorganisation by Court-Supervised Transfer

Through a court-supervised sale of assets, creditors' rights are transferred to the price received (Article XX.92 of the Code of Economic Law). As a result, the assets are transferred freely, cleanly and unencumbered to the transferee, even without the individual consent of the secured creditors concerned.

6.10 Priority New Money

New money may be made available to the company during judicial reorganisation proceedings. These new debts fall outside the scope of any amicable agreement, reorganisation plan or court-supervised transfer, which only apply to pre-existing debts. Nevertheless, new money will benefit from a super-priority right if judicial reorganisation proceedings are followed by bankruptcy proceedings (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings**).

There are no specific rules that oppose the establishment of new securities during judicial reorganisation proceedings, but the rules of good faith and abuse of rights must be taken into account. In any event, the establishment of new securities is limited to new money; new securities for pre-existing debts are excluded.

6.11 Determining the Value of Claims and Creditors

For the valuation of claims, no distinction is made between different categories of creditors.

In the event of a dispute between the company and a creditor related to the amount of a creditor's claim (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), the insolvency court may, on a provisional basis, determine the amount in respect of which the creditor will be included in the list of debts (and to the extent of which he is allowed to vote on the reorganisation plan). However, the discussion on the merits will be decided by the competent court, which may result in an adjustment of the provisional amount.

6.12 Restructuring or Reorganisation Agreement

The reorganisation plan is drafted by the management of the company. The court does not have the authority to subject the plan to a fairness test. Once the reorganisation plan has been approved by the (double) majority of creditors (see **6.1 Statutory Process for a Financial Restructuring/Reorganisation**), the court's discretion is limited to checking whether the plan respects formal requirements and conforms with public order. The court can only refuse to approve the reorganisation plan if it breaches any formal requirements or public order.

The reorganisation plan may not impose any changes on existing contracts without the consent of all contracting parties.

6.13 Non-debtor Parties

A natural person who has guaranteed any debts of the company free of charge may benefit from the terms of the amicable agreement or reorganisation plan (Articles XX.66 and XX.82 Code of Economic Law).

If a natural person is the subject of a reorganisation by court-supervised transfer, he or she can obtain remission of the debts remaining after the transfer (Article XX. 96 Code of Economic Law). In that case, the (ex-)spouse or (ex-)legal cohabitant may also be released, as well as the natural person-guarantor who did not receive any compensation for the guarantee.

6.14 Rights of Set-Off

Offsetting is only allowed between pre-existing debts and debts newly incurred during the reorganisation proceedings insofar as these debts are connected (Article XX.55 Code of Economic Law).

Offsetting between other debts (eg, between two debts arising before the proceedings or between two debts arising during the proceedings) is not subject to any special rules. Therefore, the general rules on offsetting, principally allowing offsetting, apply to these debts.

There are no special deadlines by which the creditor must claim the set-off, but it is recommended that this is done shortly after the creditor has been informed of the withheld amount of his claim so that the creditor does not run the risk of being deemed to have waived his right to set-off.

6.15 Failure to Observe the Terms of Agreements

If the company does not comply with the terms of the reorganisation plan, the reorganisation plan may be withdrawn by the court (eg, at the request of a creditor – Article XX.83 Code of Economic Law). As a result, the debts become full and immediately due and payable again, without any haircut.

A creditor cannot claim more than what was agreed in the amicable agreement or reorganisation plan (provided that this is strictly adhered to by the company).

6.16 Existing Equity Owners

Equity owners (ie, shareholders) are unaffected by judicial reorganisation proceedings and may exercise all their rights. If equity owners have non-equity related claims on the company (eg, shareholder's loan), they are treated in the same way as other creditors of the same category.

In the context of judicial reorganisation by reorganisation plan proceedings, debts may be converted into shares (Article XX.72 Code of Economic Law).

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

Under Belgian law, there are three types of statutory liquidation proceedings: voluntary liquidation, involuntary liquidation and bankruptcy.

Liquidation and bankruptcy proceedings vary in length, depending on the type of assets to be sold.

Voluntary Liquidation

- Initiated by the company itself.
- The advantage over bankruptcy proceedings is that no trustee is appointed who can look for possible grounds for a liability claim against the management of the company.
- Deficit liquidation is possible without the consent of the company's creditors. Creditors may only file for bankruptcy during liquidation proceedings if their rights are not respected or if they have additional means of action that are

not exercised by the liquidator (eg, liability claim against the management).
- A liquidator is appointed, whose mission is the realisation of the assets and the payment of the outstanding debts from the proceeds of the sale.
- The management of the company loses its authority and the liquidator will continue to manage the company with a view to settling the liquidation. Legal claims and means of enforcement must be brought against the liquidator after the commencement of the liquidation proceedings.
- The outstanding debts are determined on the basis of the company's accounts. Any disputes in this respect may be settled by the court.
- Payment to creditors shall take account of creditors' priority rights and securities.
- Offsetting of debts is, in principle, not possible, unless the debts are connected.

Involuntary Liquidation
- Initiated by summons from a creditor or the public prosecutor's office.
- Otherwise identical to voluntary liquidation (see above).

Bankruptcy
- May be initiated by the company itself (voluntarily) or can take place upon a summons from a creditor or the public prosecutor's office.
- A trustee is appointed, whose mission is the realisation of the assets and the payment of the outstanding debts from the proceeds of the sale.
- The management of the company loses its authority and the trustee will continue to manage the company with a view to settling the bankruptcy. Legal claims and means of enforcement must be brought against the trustee after the commencement of the bankruptcy proceedings.
- The opening of the bankruptcy is published in the Belgian Official Gazette. Creditors are required to declare their claims within the legal deadlines. If the creditors fail to declare their claim to the trustee, they will not be eligible to be paid from the proceeds of the bankruptcy. The trustee shall verify the declared claims. Ongoing disputes shall be settled by the court.
- Payment to creditors shall take account of creditors' priority rights and securities.
- The trustee may decide to terminate contracts unilaterally where the management of the bankruptcy estate so requires (Article XX.139 Code of Economic Law).
- Offsetting of debts is, in principle, not possible, unless the debts are connected.

7.2 Distressed Disposals
The liquidator and trustee are responsible for the sale of the company's assets (see **7.1 Types of Voluntary/Involuntary Proceedings**). Creditors are not involved in the sale process and creditors' consent is not required in principle, except in the event of a sale of a secured good in liquidation proceedings. Contrarily, in bankruptcy proceedings the trustee may sell the goods unencumbered without the secured creditor's consent.

In certain cases, court authorisation of a sale is required, such as in the event of a sale of business activity or real estate.

Pre-negotiated sales transactions are possible, but their impact is limited. Given that the liquidator or trustee takes over the management of the company, it will ultimately be the liquidator's or trustee's decision to formalise any pre-negotiated sales transactions or not. The liquidator or trustee will look at the market value of the asset, and will be liable if it sells the asset below said market value. The management of the company must therefore be cautious in negotiations prior to liquidation or bankruptcy proceedings, and should withhold from making any formal commitments.

7.3 Organisation of Creditors or Committees
Creditors are not organised in committees or in any other way.

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection with Overseas Proceedings
EU Regulation 2015/848 of 20 May 2015 is applicable, which provides for the automatic recognition of insolvency proceedings initiated in another EU Member State.

The recognition of insolvency proceedings initiated in a non-EU country are governed by the Belgian Code of Private International Law, which also provides for the recognition of foreign insolvency proceedings insofar as the rules regarding competent jurisdiction have been respected.

8.2 Co-ordination in Cross-Border Cases
In cross-border cases, a distinction is made between main proceedings and local proceedings. The trustee appointed in main foreign insolvency proceedings may request that certain measures be taken with regard to the company's assets located on Belgian territory. The reverse is equally possible. This applies to insolvency proceedings opened both inside and outside the EU (see **8.1 Recognition or Relief in Connection with Overseas Proceedings**).

In addition, local insolvency proceedings may be initiated in Belgium even if there are already main insolvency proceedings pending abroad. However, the effects of the local proceedings will be strictly limited to those assets of the company that are located on Belgian territory.

8.3 Rules, Standards and Guidelines

EU Regulation 2015/848 of 20 May 2015 and Belgian Code of Private International Law determine which jurisdiction's decisions, rulings or laws govern insolvency proceedings.

8.4 Foreign Creditors

Foreign creditors are not dealt with differently than Belgian creditors on a substantial level, but foreign creditors have the option of filing paper deeds at the court's registry or with the trustee, where this has to be done electronically for Belgian creditor-companies (Article XX.8 Code of Economic Law).

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

The statutory officers who may be appointed in proceedings are as follows:

- Judicial reorganisation proceedings:
  - (a) delegated judge;
  - (b) administrator (in case of court-supervised transfer).
- Liquidation proceedings:
  - (a) liquidator.
- Bankruptcy proceedings:
  - (a) bankruptcy trustee;
  - (b) supervisory judge.

9.2 Statutory Roles, Rights and Responsibilities of Officers

The statutory roles, rights and responsibilities of each such officer are as follows:

- Judicial reorganisation proceedings:
  - (a) the delegated judge is involved regularly in the course of the proceedings. In particular, he or she requests business information from the company to monitor its continuity and financial prospects. The judge also reviews the financial/business aspects of the reorganisation plan, as well as the plan's compliance with formal requirements. He or she reports to the court on the foregoing elements; and
  - (b) the administrator (in case of court-supervised transfer) effectuates the transfer of business (or part thereof).
- Liquidation proceedings:
  - (a) the liquidator effectuates the sale of assets and the distribution of the proceeds to creditors.
- Bankruptcy proceedings:
  - (a) the bankruptcy trustee effectuates the sale of assets and the distribution of the proceeds to creditors; and
  - (b) the supervisory judge supervises the trustee and approves (or denies) certain actions taken by the trustee.

9.3 Selection of Officers

The delegated judge, administrator, trustee and supervisory judge are appointed by the court. In voluntary liquidation proceedings, the liquidator may be appointed by the general assembly of the company. In involuntary liquidation proceedings, the liquidator is appointed by the court. These officers may be replaced by the court (eg, at the request of a creditor).

Co-operation is possible between the administrator, trustee and liquidator on the one hand and the management of the company on the other.

In principle, officers should be independent persons (ie, not creditors or directors of the company), except in the case of voluntary liquidation, in which case a director of the company may be appointed as liquidator. The administrator and trustee are often lawyers.

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

10.1 Duties of Directors

Generally speaking, the management of a company must ensure that it takes the necessary (recovery) measures in good time to protect the company's activities, such as applying for judicial reorganisation proceedings. If it does not do so, it runs the risk of being held liable on the basis of general management errors (Article 2:56 Code on Companies). In view of this, the management should ensure that it reports clearly on its discussions and decision-making (by detailed minutes of meetings).

In addition to the management's general liability, specific insolvency liabilities include the following:

- liability for any damage suffered as a result of not respecting the legal deadline to petition for bankruptcy (see **2.3 Obligation to Commence Formal Insolvency Proceedings**);
- liability for (all or part of) the debts of the company on the basis of manifest gross negligence that contributed to the bankruptcy (Article XX.225 Code of Economic Law);

- liability for unpaid social security contributions in the context of bankruptcy (Article XX.226 Code of Economic Law); and
- liability for the net debts of the bankrupt company on the grounds of "wrongful trading" if the management continues the activities of a company when that company was already considered to be manifestly lost (Article XX.227 Code of Economic Law).

The liability of the management is limited by law in relation to the turnover of the company insofar as the fault committed by the management can be regarded as a minor, non-repeated fault (Article 2:57 Code on Companies). It is unlikely that liability incurred in an insolvency context would qualify as a "minor non-repeated fault", so it is almost certain that the legal limitation of liability will not apply in an insolvency context.

10.2 Direct Fiduciary Breach Claims

In an insolvency context, the starting point is that the liquidator or trustee brings a liability claim against the management of the company, the proceeds of which then benefits the entire estate of all creditors. In the event of manifest gross negligence that contributed to the bankruptcy, individual creditors may bring a claim themselves for the benefit of the bankruptcy estate if the trustee fails to do so.

Principally, creditors can thus not bring a direct claim for their own personal benefit, unless they suffer a personal loss distinct from that of other creditors. An example of this is a claim which a creditor has against a director because he contracted with the company on the basis of incorrect financial information or because his claim arose after the company should already have been declared bankrupt.

Liability claims based on "wrongful trading" are exclusively reserved for the trustee.

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

Historical transactions that preceded insolvency proceedings (such as credit and security transactions and asset sales) can be set aside or cancelled irrespective of insolvency proceedings on general rules, such as fraud, error or coercion.

In addition, bankruptcy law expressly provides that an act or payment is not opposable to the bankruptcy estate if it was made with fraudulent prejudice to the rights of creditors, irrespective of the date on which it took place (Article XX.114 of the Code of Economic Law).

Certain transactions may also be set aside if they took place during the so-called "hardening period" (see **11.2 Look-Back Period**).

11.2 Look-Back Period

As a starting point in bankruptcy proceedings, the date of cessation of payment is presumed to be the date of the judgment declaring the company bankrupt (Article XX.105 Code of Economic Law). The court may, however, set the date of cessation of payment at an earlier date than the date of the bankruptcy judgment, if serious and objective circumstances indicate unequivocally that payments have ceased before the bankruptcy judgment. This date of cessation of payment may not be earlier than six months prior to the bankruptcy judgment.

The so-called hardening period is the period between the date of cessation of payment as determined by the court and the date of the bankruptcy judgment (Article XX.111 of the Code of Economic law). Transactions that took place during the hardening period may be declared non-opposable to the bankruptcy estate at the request of the trustee, with the purpose of protecting the creditors of the bankrupt company against any actions taken shortly before the bankruptcy and aimed solely at withdrawing certain parts of the assets from the bankruptcy estate.

As a rule, the following actions are never opposable to the bankruptcy estate:

- all transfers of goods, free of charge, or for which the consideration received by the company is appreciably inferior to the value of the goods;
- payments of debts that are not yet due, and payments other than in cash or commercial paper, of debts that are due; and
- the establishment of a mortgage or a pledge for debts previously due.

In addition, any payment or transfer of goods for consideration may be ruled unopposable if the receiving third party had knowledge of the cessation of payment (Article XX.112 of the Code of Economic Law).

However, the above rules do not apply to payments effectuated in the context of judicial reorganisation proceedings (Article XX.53 Code of Economic Law).

11.3 Claims to Set Aside or Annul Transactions

Claims to set aside or annul transactions may be brought in the context of bankruptcy proceedings, but not in restructuring proceedings.

The right of action belongs exclusively to the trustee.

Lydian is a full-service Belgian business law firm with offices in Brussels, Antwerp and Hasselt, and an Anglo-Saxon approach to practising law. Through a fine blend of transactional law expertise and litigation skills, it delivers straight to-the-point solutions that add true value, providing practical and personalised advice in a constantly changing world. The firm's mission is to find solutions through excellent legal insight and strong business instinct. The Insolvency and Restructuring Team consists of five business lawyers, offering combined know-how in company law and commercial law. The practice is especially known for corporate restructurings and reorganisations, workforce restructurings both domestically and cross-border, and instructions in connection with the recovery of assets from distressed companies.

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