International
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Legal Guides

Restructuring & Insolvency 2021

A practical cross-border insight into restructuring and insolvency law

15th Edition

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Preface

Welcome to the 2021 edition of *ICLG – Restructuring & Insolvency*. Macfarlanes is delighted to continue to serve as the Guide's contributing editor.

The detailed content of year's edition is very different from years gone by, primarily as a consequence of the government reactions to the consequences of COVID-19, and I expect that there will be yet more change to reflect in the chapters of this Guide in the years to come. A lot of what we have seen in the past year could be described as 'crisis management'. For example, suspensions of director liability for late insolvency filings and blocks on creditor action to recover unpaid debts in many jurisdictions have helped to ensure that formal insolvencies are much lower than the historic average. However, those types of measures fail to address the massive accrual of liabilities on corporate balance sheets through the deferral of tax payments, the non-payment of rent to landlords and borrowing under government-backed loan schemes. If the post-pandemic economic recovery is not to be drawn out for many years to come, practitioners will need to come up with appropriate solutions – potentially with the assistance of further legal reform. My colleagues Simon Beale and Amy Walker consider this in their Expert Analysis chapter, which I commend to you.

This year's edition contains contributions from many leading practitioners, including an insight into the issues in restructuring and insolvency across 25 jurisdictions. We are very grateful for their support and we trust that you will find it valuable. Please do get in touch with relevant contributors directly, should you need to understand the most recent developments in any particular place.

I hope that you keep well.

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Belgium

Stibbe

Pieter Wouters

1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor- to creditor-friendly jurisdictions?

Belgian restructuring law can be considered to be debtor-friendly for viable business, as well as being creditor-friendly at the same time as it provides tools for creditors to counter any abuse of this branch of law by debtors.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

Belgian insolvency law allows for informal work-outs (i.e., reaching an amicable settlement with two or more creditors), formal restructuring (i.e., judicial reorganisation procedure under court supervision), and insolvency proceedings (i.e., for bankruptcy and liquidation). Formal restructuring and insolvency proceedings are often used in practice. Informal work-outs are never publicly disclosed. In our experience, informal work-outs have proven to be useful for several matters. Very recently, the legislator adopted a hybrid procedure in which there is first a more informal phase, followed by a formal one.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

Directors can be held liable on various grounds when they are managing a company in financial difficulties. In summary, directors should consider these specific issues when doing so:

- Any current and former director and all other persons who had *de facto* authority to manage and run the company's business can be held liable for all or part of the company's liabilities up to the amount of the shortfall if either is proven: (i) that a manifest, serious mistake committed by one of them contributed to the bankruptcy; or (ii) the directors knew or should have known that there was obviously no reasonable prospect in continuing the activities and in avoiding bankruptcy and that they failed to act as a reasonable and prudent director placed in the same circumstances.
- Directors can, under certain circumstances, incur liability for unpaid social security contributions, corporate tax, or VAT.
- Directors will have to fulfil certain duties with regard to informing the employees.
- Directors must timely convene an extraordinary general meeting of shareholders in case of loss of equity (the financial threshold depends on the type of company).
- Finally, directors have a statutory duty to file for bankruptcy within one month after the company is in the state of bankruptcy, i.e., when it has ceased to pay its debts and its creditworthiness is undermined. A director who did not timely file for bankruptcy can be held liable towards the company and third parties for any losses incurred as a result of his or her failure to file for bankruptcy. Directors can also be punished under criminal law for certain acts and omissions (e.g., not filing for bankruptcy on time or at all) if such acts and omissions are found to have been committed intentionally to delay the bankruptcy.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

Shareholders can decide to put a limited company ("*NV / SA*") in liquidation when the company's net asset value becomes less than half or one-quarter of its share capital.

The public prosecutor or any party with standing can have an NV / SA summoned before court and can seek its liquidation if the company's net asset value becomes less than 61,500 euros. However, the court can grant the company time to correct its situation.

The public prosecutor, one or more creditors, the temporary administrator who is appointed to oversee the debtor, or the bankruptcy receiver in the main proceedings can petition for the debtor's bankruptcy.

If certain conditions are met, the public prosecutor, a creditor or any party that is interested in acquiring the debtor's business can seek the opening of a judicial reorganisation procedure against the debtor in order to have the debtor's assets and business activities transferred under court supervision.

A debtor is protected from a petition for bankruptcy or liquidation once it has filed an application for the opening of a judicial reorganisation procedure. This filing also automatically suspends any enforcement. However, any seizure of goods that is already in an advanced stage cannot be stayed automatically because of the filing, so the debtor, in such situation, will have to request the court to order suspension of such seizure.

If the court affirms the opening of a judicial reorganisation procedure, the court will grant the debtor a moratorium. During the moratorium:

- no bankruptcy or liquidation proceedings may be opened in respect of or pursued against the debtor;
- no means of enforcement (in relation to both movable and immovable assets) against the debtor may be used or pursued for claims pre-dating the opening of the judicial reorganisation procedure; and
- no assets of the debtor may be seized for claims pre-dating the opening of the judicial reorganisation procedure unless the seizure is in an advanced stage and the court did not suspend it.

The prohibition of enforcement during the moratorium prevents the enforcement of recovering actual security interests (e.g., a pledge or mortgage) or enforcement sought by creditors benefitting from a statutory lien. However, it is allowed to enforce: (i) any specific pledge over claims; and (ii) financial collateral created under the Act of 15 December 2004 on financial collateral (on the condition that the debtor is in default).

The debtor can also opt for a restructuring aiming at coming to a "preparatory agreement". In such restructuring there is no automatic moratorium, but the court-appointed commissioner can seek the court to permit conditions and/or postponement of payment of all or part of the debt as suited to the needs of the debtor. The duration of such conditions and instalments may not exceed four months.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

In case of bankruptcy, certain transactions may be declared ineffective against third parties if concluded or performed by the debtor during the so-called "hardening period" (a period of a maximum of six months before the date of the bankruptcy order, except in the case where the bankruptcy order relates to a company that was dissolved more than six months before the date of the bankruptcy order in circumstances suggesting an intent to defraud its creditors).

The transactions entered into or performed during the hardening period that may be declared ineffective against third parties include, among others, (i) gratuitous transactions entered into at an undervalue or on extremely beneficial terms for the counterparty, (ii) payments for debts which are not due, (iii) payments other than in cash for debts due, and (iv) security provided for pre-existing debts.

In addition, the court may, at the request of the trustee and at its discretion, declare ineffective against third parties other transactions entered into or performed during the hardening period provided that the counterparty was aware of the debtor's cessation of payments and the court determines that this declaration would benefit the bankruptcy estate.

The above provisions have been made inapplicable to a large extent with regard to financial collateral and with regard to certain transactions that have taken place within the framework of a judicial reorganisation procedure.

So-called "fraudulent transactions", i.e., abnormal transactions entered into with the knowledge that the transaction would prejudice the creditors of a company, are also ineffective in the subsequent bankruptcy of that company. This is so even if the transaction dates back from before the hardening period.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

Belgian restructuring law gives the debtor the possibility to conclude an amicable settlement with two or more of its creditors.

The reason for creditors to want to conclude such settlement with their debtor lies in the fact that such type of agreement enjoys protection from certain claw-back rules, as mentioned under question 2.3.

Very recently, the legislator adopted a hybrid restructuring tool that allows a debtor to negotiate a "preparatory agreement". This concept allows the debtor-company to negotiate an amicable settlement with two or more creditors, or to negotiate a debt-restructuring plan that involves all creditors without any obligation to publish any notices. If the debtor is successful in negotiating a "preparatory agreement", it can be submitted to the court, in which case the court will open an accelerated process of the judicial reorganisation proceedings with fewer strict formalities. These proceedings will usually end within a maximum of one month if an amicable settlement has to be sanctioned, or a maximum of three months if a debt-restructuring plan has to be voted for by all creditors.

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?

A debtor can opt for a reorganisation procedure under court supervision. The purpose of undergoing such judicial reorganisation procedure is to preserve the continuity of all or part of the company or of its viable business activities. A debtor can also initiate a judicial reorganisation procedure after having negotiated a preparatory agreement (see question 3.1). A pre-packaged sale is not allowed.

A judicial reorganisation procedure can be initiated with the aim to:

(i) Conclude an amicable settlement with two or more creditors (this is similar to the amicable settlement mentioned under question 3.1, but it is concluded under court supervision). The amicable settlement cannot affect third parties' rights.

(ii) Implement a debt restructuring plan. The reorganisation plan can contain the conversion of debt into equity. The restructuring plan will be submitted for voting at a meeting attended by the creditors and will only be adopted if (i) the majority of the creditors attending the meeting, and (ii) the majority share of the total value of the debt claims (the principal sum) vote in favour of such plan. The creditors are not divided into classes, but the plan can provide for a differential treatment of creditors.

If the creditors' meeting votes in favour of such plan, the court will ratify it, and the plan will then bind all the debtor's creditors.

(iii) Selling all or part of its assets and activities to a third party. Upon completion of the sale, the creditors are entitled to exercise their rights on the sale proceeds. Any remaining part of the company can then be submitted to either bankruptcy or a voluntary liquidation.

Any party with standing can demand early termination of a judicial reorganisation procedure if the debtor can no longer ensure the continuity of its activities in accordance with the aim of the procedure.

3.3 What are the criteria for entry into each restructuring procedure?

An out-of-court amicable settlement can be concluded as soon as this is necessary for reorganising the debtor's business.

A debtor can negotiate a preparatory agreement or request the opening of a judicial reorganisation procedure if the debtor's continuity is threatened in the short- or long-term.

3.4 Who manages each process? Is there any court involvement?

An out-of-court amicable settlement is managed by the directors and without court involvement.

A judicial reorganisation procedure with a view to concluding an amicable settlement or implementing a debt restructuring plan is managed by the directors under court supervision.

A judicial reorganisation procedure with a view to selling all or part of the debtor's assets is managed by a judicial administrator acting under court supervision. However, the directors remain on board to manage the company.

The judicial administrator also has a more active role in case of a restructuring with the aim of negotiating a preparatory agreement.

Under certain circumstances, the court can appoint a judicial administrator to assist or to replace the directors.

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

A judicial reorganisation procedure does not terminate any contract, and contractual provisions that allow for early termination or acceleration of the contract to be triggered by the initiation or opening of a reorganisation procedure are null. A creditor may not terminate a contract on the basis of a debtor's default that occurred prior to the reorganisation procedure if the debtor remedies such default within 15 days from the date of the default notice. Subject to certain conditions, close out netting provisions can be upheld.

As an exception to the general rule of continuity of contracts, the debtor may cease performance of a contract during the reorganisation proceedings if the debtor notifies the creditor about it and the decision to cease performance is necessary for the reorganisation of the business. The debtor's exercise of this right to cease performance does not preclude the creditor from suspending, on its turn, the performance of its own obligations under that contract.

Claims arising during the judicial reorganisation procedure will be treated preferentially over all other creditors' claims in the event of a subsequent bankruptcy or liquidation. Moreover, claims arising after the opening of the judicial reorganisation procedure are not subject to the moratorium and can thus be enforced. They can also be set off.

3.6 How is each restructuring process funded? Is any protection given to rescue financing?

Belgian law explicitly allows the debtor to provide new security interest for both existing and new debts (e.g., bank credits, factoring, etc.) during the moratorium as long as doing so will sustain the continuity of the business. Any new collateral granted during the moratorium cannot be challenged in a subsequent bankruptcy.

Claims arising after or relating to services rendered after the opening of the restructuring proceedings are regarded as an estate's debts in the event of subsequent liquidation proceedings. Estates' debts have the highest priority over all claims, and rank higher than any other type of debt claim.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

There are two types of liquidation procedures under Belgian law: bankruptcy; and voluntary or judicial liquidation.

4.2 On what grounds can a company be placed into each winding up procedure?

A company that has ceased to pay its debts persistently as they become due and that is no longer in a position to obtain credit can be declared bankrupt.

Voluntary liquidation of a company results from a decision made by the general shareholders' meeting.

A company can be placed in judicial liquidation on various grounds. The most common ones are:

- failure to file its annual accounts with the National Bank of Belgium;
- removal of the company from the Crossroads Bank for Enterprises;
- failure to appear when summoned before the chamber for companies in difficulty; and
- impairment of the company's net equity capital as a consequence of accumulated losses.

4.3 Who manages each winding up process? Is there any court involvement?

The bankruptcy procedure is managed by one or more court-appointed bankruptcy receivers. The court also appoints a bankruptcy judge who supervises the procedure.

Liquidation is managed by a liquidator who is appointed by the shareholders (but such appointment must be approved by the court if the balance sheet shows that third parties will not be paid in full) in case of a voluntary liquidation, and appointed by the court in case of a judicial liquidation. The court will have to approve the payment distribution plan that describes the distribution of funds if not all creditors will be paid.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

As a general rule, the enforcement rights of individual creditors are suspended once the court declares the opening of bankruptcy proceedings. And only after this declaration is the bankruptcy receiver allowed to take any actions against the debtor and liquidate its assets. However, such suspension does not apply to any pledge of financial instruments or cash held on account, which falls under the scope of the Act of 15 December 2004 on financial collateral.

For creditors whose debt claims are secured by certain movable assets, such suspension would normally be limited to the period required for the first verification of the debt claims.

For creditors whose debt claims are secured by immovable assets, the intervention of the bankruptcy receiver is necessary to pursue the sale of the assets. A first-ranking mortgagee will generally be entitled to pursue the enforcement of its mortgage after the first verification of the debt claims if the enforcement procedure was already in an advanced stage.

In case of liquidation, unsecured creditors and creditors with a general privilege on all assets lose their enforcement rights, save to the extent that the enforcement would not prejudice other creditors or the proper course of the liquidation. Creditors whose debt claims are secured by certain movable assets or immovable assets do not lose their enforcement rights.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The declaration of bankruptcy or opening of a liquidation does not in itself cause the termination of existing contracts. However, two exceptions apply:

- the parties to a contract may contractually agree that the occurrence of a bankruptcy/liquidation constitutes an early termination or acceleration event; and
- *intuitu personae* contracts (i.e., contracts whereby the identity of the other party constitutes an essential element of the contract conclusion) are automatically terminated.

In case of a bankruptcy, the bankruptcy receiver may elect not to perform the obligations of the bankrupt party that are still outstanding after the bankruptcy if such decision is necessary for the management and the liquidation of the bankrupt estate. The counterparty may not seek injunctive relief or specific performance of the contract.

Subject to certain conditions, close out netting provisions can be upheld.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

In case of bankruptcy (or deficit liquidation), the debts will generally be priority-ranked according to a complex set of rules. Here is a general overview of these rules:

- Estate's debts: All costs and debt incurred by the bankruptcy receiver/liquidator during the bankruptcy/liquidation proceedings are known as "estate's debts", and these have ultimate priority. In addition, if the bankruptcy receiver/liquidator has contributed financially towards the sale and enforcement of secured assets, such contribution will be refunded to the receiver as priority, which will be paid out from the proceeds from the assets sold before the rest of the proceeds are distributed to the secured creditors.
- Security interests: Creditors that hold a security interest have a priority right over the secured asset (whether by means of appropriation of the asset or from the proceeds generated from the asset's sale).
- Privileges: Creditors may have a particular privilege right on certain or all assets (e.g., tax claims, claims for social security premiums, etc.). Privilege rights on specific assets rank higher than privilege rights on all of the assets of the debtor.
- *Pari passu*: Once all of the estate's debts are settled and once the creditors holding security interests and privilege rights are satisfied, the sale proceeds from the remaining assets will be distributed among the unsecured creditors who are ranked *pari passu* (unless a creditor agrees to be subordinated).

4.7 Is it possible for the company to be revived in the future?

No, it is not possible to revive a company once the bankruptcy procedure/liquidation has been closed.

There is a possibility, however, to appoint a bankruptcy receiver *ad hoc* or to reopen the liquidation if assets are discovered after the closing of the bankruptcy/liquidation.

Furthermore, and as from the closing of the liquidation, creditors have five years to still initiate proceedings against the liquidated company. If the liquidation was closed while fraudulently disregarding the interests of a creditor, such creditor can seek to have the closing of the liquidation declared null. If such claim is granted by the court, the liquidation will be reopened.

5 Tax

5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

A creditor who has filed a debt claim in the bankruptcy is entitled to record that claim immediately as loss and to request the refund of VAT, insofar as it is applicable.

The opening of a judicial reorganisation procedure does not affect the debtor's tax obligations.

Debt reductions or waivers granted by creditors in the framework of a collective restructuring plan approved by the court is not regarded as a taxable gain for the debtor.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

An employment contract is considered an ongoing contract and does not end when bankruptcy proceedings pertaining to the employer are opened. The bankruptcy receiver is the one who must terminate the employment contracts. However, the law sets out a simplified procedure for the bankruptcy receiver to dismiss employees.

No specific rules apply to employee dismissals in the event of the employer's liquidation, so the liquidator needs to comply with labour law provisions on the dismissal of employees.

Unpaid salaries and severance pay benefit from a privilege right on all movable assets of the debtor-employer. It is important to note that in certain circumstances, Belgian law gives dismissed employees the right to a (capped) financial contribution from the Indemnity Fund for the closing-down of firms.

In case of judicial reorganisation procedure, employment contracts are not affected and remain in full force. Belgian law, just as the law in most EU countries, allows the employer the possibility to dismiss employees for economical or other specific reasons as part of a social plan. In case of a judicial reorganisation procedure with a view to selling all or part of the debtor's assets and activities, the parties involved will have to abide by a specific Collective Bargaining Agreement (i.e., CBA no. 102) which, in short, entitles the buyer to decide on how many employees should be transferred and even to renegotiate to some extent the individual terms of employment with the employees concerned. The CJEU has, however, decided that the right to choose the number of employees violates Council Directive 2001/23/EC.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

In situations to which Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("European Insolvency Regulation") does not apply, Belgian private international law states that companies incorporated elsewhere can use restructuring procedures or enter into insolvency proceedings if its principal establishment is located in Belgium. In most cases, the concept of "principal establishment" will be aligned with the concept of "centre of main interests", which is used in the European Insolvency Regulation.

If the establishment is not the principal establishment, secondary insolvency proceedings can be opened that will affect the Belgian establishment only.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

In situations to which the European Insolvency Regulation does not apply, Belgian private international law states that foreign judgments with regard to restructuring or insolvency proceedings can be recognised in Belgium if all conditions for recognition are met (e.g., the judgment (i) does not contravene certain provisions regarding applicable law, public order, the right of defence, (ii) does not contravene another judgment, and (iii) does not attempt to escape or deviate from mandatory law, etc.).

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Yes, this has been the case for some Belgian companies because they are members of an international group, but it is not common practice.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Belgian insolvency law does not contain regulatory provisions regarding groups of companies. It is possible, however, for a group of companies to have the same insolvency practitioner appointed.

In an international context, Belgian insolvency law contains provisions that give effect to the group insolvency provisions under the European Insolvency Regulation. It also contains provisions on co-operation in case of an international insolvency that falls outside the scope of the European Insolvency Regulation.

9 COVID-19

9.1 What, if any, measures have been introduced in response to the COVID-19 pandemic?

In April 2020, the Belgian Government announced that companies in difficulty could invoke a temporary moratorium (Royal Decree No. 15 of 24 April 2020) whereby any debtor-company was in principle protected from enforcement measures sought by creditors and from being declared (or forced to be declared) bankrupt. The temporary moratorium had an initial validity until mid-June 2020 and was reintroduced by law in December 2020 during the second national lockdown. At the end of January 2021, the government decided not to extend the temporary moratorium but, instead, promised new measures by the end of March.

On 26 March 2021, the legislator created the possibility to restructure a company through a "preparatory agreement". This new concept is part of a temporary legislative arrangement (valid until 30 June 2021) until lawmakers adopt a more thorough reform of the insolvency procedure, which is expected by mid-July, in view of transposing the new EU directive on restructuring and insolvency.

The concept of the preparatory agreement allows the debtor-company to negotiate an amicable settlement with two or more creditors, or to negotiate a debt-restructuring plan that involves all creditors without any obligation to publish any notices. In this way, debtor-companies can try to solve their liquidity problems in peace and, when ready, they can announce the solution they are ready to offer. The purpose is to prevent or restrict reputational harm and to prevent panic among creditors and trading partners. The court-appointed commissioner can seek the court to permit conditions and/or postponement of payment of all or part of the debt. If the debtor is successful in negotiating a preparatory agreement, the court can open an accelerated process of the judicial reorganisation proceedings with fewer strict formalities.

The provisions concerning the "preparatory agreement" mechanism remain in force until 30 June 2021, but the Government can still extend it. In fact, an extension is expected given the difficulties in containing the COVID-19 pandemic. In addition, new changes to insolvency law have been announced, as Belgium is now working on transposing the Restructuring and Second Chance Directive (2019/1023), which must be implemented by this summer.

Pieter Wouters handles disputes mainly regarding insolvency law, security interests, company law, banking law, law of obligations, and usual contracts.
Pieter has built up extensive expertise in the field of insolvency law by regularly assisting clients in various types of important insolvency matters. In addition, he has acquired specialised expertise in liquidations by assisting in the finalisation stage of liquidations. Pieter is also often sought to assist liquidators when they encounter complex legal issues in liquidation procedures.
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