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NEW BELGIAN INSOLVENCY RULES

On 13 July 2017, the Belgian parliament adopted a new insolvency bill. The bill, which is set to enter into force on 1 May 2018, abolishes and replaces the former bankruptcy law and the law on the continuity of enterprises, and brings together all relevant provisions in a new Book XX of the Code of Economic Law. Although the Bill does not change a number of fundamental principles applicable to Belgian insolvency procedures, it modernises and streamlines these procedures and brings them in line with EU standards.

Key issues

- Overhaul of the current insolvency laws
- Extension of new rules to liberal professions and enterprises without legal personality
- Extraordinary status of creditors in judicial reorganisation limited to amount of secured claim
- Possibility to register security pending reorganisation
- Focus on redress through (out-of-court) settlement
- No "pre-pack"
- Increased liability for (de facto) directors and managers in the case of wrongful trading
- Automatic waiver of debt for non-corporate distressed debtors
- Electronic submission of claims and (access to) insolvency file

EXTENSION OF THE SCOPE OF APPLICATION OF THE BELGIAN INSOLVENCY RULES

The new insolvency rules apply to all legal entities as well as all individuals independently exercising a professional activity, regardless of the nature of the economic activity. As a result of this extension, persons exercising a liberal profession, non-profit organisations (*asbl/vzw*) and foundations can henceforth be subject to insolvency procedures. Private partnerships without a distinct legal personality will also be covered by the new rules, as will trusts and other foreign entities.

In line with EU law, more particularly the recast EU Insolvency Regulation (2015/848), the Belgian courts will be competent to open (main) insolvency proceedings with regard to the abovementioned entities if their centre of main interests is situated in Belgium. Secondary insolvency proceedings can be opened if the debtor has an establishment in Belgium. The bill also implements the specific provisions of the Insolvency Regulation which promote the coordination between main and secondary insolvency proceedings and the cooperation of insolvency practitioners, and introduces rules of a similar, though more limited, nature on the cooperation with non-EU bankruptcy courts and practitioners.

Confirming a previously existing practice to centralise insolvency proceedings involving several group entities before the same court, the Belgian bankruptcy courts will now formally be able to open insolvency proceedings against several group companies (or the partners of an insolvent private partnership), and to appoint a common insolvency practitioner. Genuine group insolvency proceedings remain, however, non-existent. It therefore remains to be seen whether and to what extent the option to centralise bankruptcy proceedings before the same court (combined, as the case may be, with the possibility to coordinate with practitioners of other group companies within the EU pursuant to the Insolvency Regulation) will facilitate the administration of complex group insolvencies. This will ultimately depend on the flexibility and willingness of

the Belgian courts and insolvency practitioners to make use of the tools handed to them by the Bill and the Insolvency Regulation.

CLARIFICATIONS REGARDING THE POSITION OF CREDITORS

The Bill leaves the substantive rules governing the currently existing insolvency procedures largely intact. A debtor whose assets or activities remain viable will continue to be able to apply for the judicial reorganisation of its business. A reorganisation may take the form of a settlement with two or more creditors, a collective plan endorsed by a majority of its creditors, a transfer of part of its business, or a combination of any of the foregoing. Bankruptcy proceedings are available if a debtor no longer has credit and is no longer able to pay its debts as they fall due.

Putting an end to certain controversies which had arisen under the former rules, the legislator has clarified several issues and has introduced some important innovations for both types of insolvency proceedings.

In particular, the new rules clarify that the special treatment of secured claims in judicial reorganisation proceedings (the principal of which, *inter alia*, cannot be reduced without the consent of the creditor) is limited to the value of the underlying collateral, and that if the amount of a secured claim is larger than the value of the underlying collateral, the excess is treated as an ordinary claim. Although this is possibly an oversight of the legislator, the claims of creditors benefiting from a special privilege no longer qualify as extraordinary claims. As a result, the principal amount of such creditors can, *inter alia*, be reduced up to 80%.

Creditors will, moreover, be entitled to register a security interest over movables or immovables pending reorganisation proceedings, without such security being subject to hardening period risk to the extent that it relates to pre-existing debts. In the event that a security interest is registered after the opening of reorganisation proceedings, the secured claim will, however, continue to be treated as an ordinary claim in these proceedings.

In judicial reorganisation proceedings involving a transfer of business, it will furthermore become possible for a potential transferee to bid for contracts which are not *intuitu personae* (although the liabilities under such contracts will not count towards the calculation of the purchase price offered by the bidder). If its offer is accepted, the selected contracts will transfer automatically to the bidder, without the consent of the counterparty being required.

Existing contracts cannot be terminated automatically by reason merely of the opening of reorganisation proceedings, but their performance can be suspended unilaterally by the debtor, in which case the creditor can likewise suspend performance.

Although enforcement action is generally suspended pending judicial reorganisation proceedings, this suspension does not affect security over specifically pledged (present or future) receivables, which remains enforceable. Similarly, security over assets in other jurisdictions, security over financial instruments and, subject to certain exceptions, security over bank receivables and contractual set-off arrangements remain enforceable notwithstanding the opening of reorganisation proceedings. The new rules also provide that proceedings previously initiated for the forced sale of the debtor's movable or immovable goods can be pursued after the proceedings are opened if the date of the sale falls within two months of the filing of the

petition for judicial reorganisation. The debtor can, however, request a suspension.

FOCUS ON REDRESS

No Belgian "pre-pack"

The Belgian legislator initially intended to introduce the possibility of a pre-pack into Belgian law, allowing a debtor to prepare silently the transfer of (parts of its) business to a potential transferee under the supervision of an insolvency practitioner. This option was, however, abandoned in light of recent case law of the European Court of Justice highlighting the risk that a pre-pack would be regarded as a transfer of undertaking, which would, in accordance with applicable EU rules, imply the automatic transfer of the rights and obligations of all existing employees of the transferor. It is to be noted that the same risk may apply to judicial reorganisation proceedings involving a transfer of business, which remains an option under the new rules.

Although the scrapping of the envisaged Belgian pre-pack seems a missed opportunity to allow for a silent restructuring, it remains possible for a debtor to restructure its activities through judicial reorganisation proceedings. Although this type of restructuring is not "silent", the new rules offer some possibilities for the debtor to prepare the process in advance, in particular by asking the insolvency court to appoint a business mediator to facilitate a restructuring.

Reinforced out-of-court restructuring

The new rules furthermore incentivise out-of-court restructurings by granting the courts the ability to endorse a settlement between a debtor and two or more of its creditors to make it enforceable. Such a settlement will only be subject to very limited publicity. Save for certain limited exceptions, a bankruptcy receiver will not be able to challenge such an informal settlement in subsequent bankruptcy proceedings based on the hardening period rules. Moreover, creditors will not incur any liability if the out-of-court restructuring is unsuccessful.

Second chance

Lastly, in order to promote the second chance of a distressed debtor, the new rules provide, by default, for the waiver of residual debts of non-corporate distressed debtors, if the debtor has requested this. The waiver can only be refused upon the request of a party (including the bankruptcy receiver or public prosecutor) in the case of serious misconduct having contributed to the bankruptcy. In addition, the proceeds of a new economic activity pending the bankruptcy proceedings do not fall within the bankrupt estate.

REINFORCED LIABILITY REGIME

The new rules incorporate the liability regime formerly included in the Company Code of (former) managers or (de facto) directors of insolvent companies for a company's debts in the case of manifest misconduct which has contributed to the company's insolvency. Aside from the bankruptcy receiver, creditors will now also be entitled to introduce this type of action for liability if the bankruptcy receiver fails to do so. To the extent that the bankruptcy receiver decides to pursue the action further or the action is successful, the creditor's costs are reimbursable by the bankrupt estate. The proceeds of the action will benefit the bankrupt estate, taking into account, as the case may be, the legal priorities.

Aside from the aforementioned liability, the law also formalises existing case law and legal doctrine on the liability of (former) managers and (de facto)

directors in the case of wrongful trading of an insolvent company. Only the bankruptcy receiver can initiate a claim on this basis.

DIGITISATION OF INSOLVENCY FILES

A final important change in practice is that the legislator has opted for the digitisation of insolvency proceedings. The bill provides that insolvency files will exclusively be held, electronically, in a Central Solvency Register which is available online at www.regsol.be. In accordance with the Insolvency Regulation, this register will, in the future, be linked with the national insolvency registers of other EU countries. The parties involved in insolvency proceedings and, as the case may be, third parties, will be able to access the information contained in the Central Solvency Register, depending on the type of insolvency proceedings, the type of information requested and the interests of the party concerned.

Since 1 April 2017, creditors can only submit claims and documentary evidence in a bankruptcy through the electronic register, subject to certain exceptions for foreign creditors and natural persons that are not represented by legal counsel. Another innovation is that foreign creditors can validly submit their statement of claim in English, through a standard form to be made available. Notifications to creditors will also be served electronically.

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