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Global Restructuring & Insolvency Guide

Belgium

Overview and Introduction

This chapter gives a short overview of three restructuring and liquidation proceedings under Belgian law: bankruptcy, judicial administration and voluntary liquidation.

Bankruptcy proceedings are conceived as a way to liquidate the business of the company (either as a going concern or by selling the assets piece by piece) with a view to paying the debts of the company. As a rule, the company itself will cease to exist at the end of the bankruptcy proceedings and the shareholders of the company will no longer have a stake in the business (unless they purchase the business or assets from the receiver). It is not so much a reorganisation as a liquidation.

Judicial reorganisation is a procedure aimed at enabling a company in financial difficulty to restructure itself in order to continue its activities and pay back its creditors. Unlike bankruptcy, the aim is not the liquidation of the company, but its survival. During judicial administration, the debtor is protected against its creditors and cannot be declared bankrupt.

Voluntary liquidation is the result of a decision of the shareholders' meeting to dissolve the company. It results in the liquidation of assets of the company and the company will cease to exist. In practice, a company is often "liquidated" as a matter of fact, by ceasing the activities and selling off the assets before the formal decision to dissolve is taken. The formal liquidation in such cases mainly involves drawing up the liquidation accounts and distributing the proceeds.

All three procedures can be used by companies with a commercial nature. This Guide will not deal with the procedures applicable to other companies or organisations, or to physical persons (individuals).

Bankruptcy

When is a Company in State of Bankruptcy?

Under Belgian law, a situation of bankruptcy arises when two conditions are simultaneously met:

- The relevant company has generally stopped paying its (financial and/or trade) debts as they fall due (*is in staking van betaling/est en état de cessation de paiement*); and

- The company has lost the confidence of its creditors (loss of creditworthiness: *geschokt krediet/credit ébranlé*). A company is deemed to have generally lost all creditworthiness when it can show that it cannot receive credit on the market (typically with financial institutions) at reasonable conditions for an amount that is sufficient to pay the company's debts as they fall due. Generally, when the company's customary credit providers have terminated all credit lines, a court will assume that other credit institutions, which are less familiar with the company's business, will not extend credit either.

In other words, under Belgian law, bankruptcy is caused by a lack of liquidity, not by a lack of solvency. It is possible that a company is in state of bankruptcy even though its assets exceed its liabilities. It is also possible that the liabilities greatly exceed the assets without bankruptcy, e.g. where the liabilities are not due and payable, or if banks or other third parties are willing to give credit to the company.

When Can or Should the Company File for Bankruptcy?

A Belgian company that meets the two criteria set out under “When is a Company in State of Bankruptcy?” above is under a legal obligation to file for bankruptcy within one month from the time when these conditions are first met.

Failure to make the appropriate filings exposes the board of directors to both civil and criminal liability. A timely filing, on the other hand, does not necessarily shield directors against liability.

Who Should File for Bankruptcy?

Board of Directors

It is the sole authority of the board of directors of the company (or, in certain cases, its liquidator) to file for bankruptcy. The board of directors must take the decision to file for bankruptcy and can give a proxy to one of the directors or a third party to make the actual filing.

The shareholders’ meeting does not have to approve the decision to file for bankruptcy. As a matter of law, the shareholders’ meeting cannot instruct the board of directors or another agent to file for bankruptcy.

Third Parties

Even in the absence of a bankruptcy filing by the company, a court can declare a company bankrupt at the request of its creditors or the public prosecutor, or on the basis of information provided by the Commercial Investigations Division (which is a special branch of the Commercial Court charged with monitoring the financial performance of distressed entities) or by the company’s employees.

Employee Information

It is worth noting that, at the time of filing for bankruptcy (at the latest), a copy of the petition for bankruptcy and the data supporting the state of bankruptcy must be communicated to, and discussed with, the representatives of the company’s employees.

How to File for Bankruptcy

Where?

The petition for bankruptcy must be filed with the registrar of the Commercial Court that has jurisdiction over the registered office of the company at the time of the payment stoppage, and must be drafted in the official language of that court.

Documents to be Provided

As a bankruptcy procedure is not a reorganisation, it is not required (or even customary or useful) to include a plan of reorganisation with the file submitted to the court. As bankruptcy is essentially a liquidation procedure, the file that has to be submitted is a straightforward inventory of the assets and liabilities of the company. The file should allow the court to assess whether the company is in a state of bankruptcy and the receiver to immediately seize control of the company.

The Bankruptcy Act provides a list of items to be included in the file. Often the registrars of local courts supplement this list with their own informal lists, but, as a rule, a file is complete if the following items are included:

- A balance sheet of the company (or a memorandum explaining why it is impossible to provide this balance sheet);
- The account books of the company;
- Detailed information with respect to employees and social matters: the register of employees; the individual accounts of employees of the current and the preceding calendar year; information with respect to the social administration office and the social fund of the company; the identity of the

members of the committee for prevention and protection at work and the members with trade union representation; and the access code provided by the Federal Social Security Service to the company (for the electronic register of employees);

- A list of the names and addresses of the customers and suppliers of the company; and
- A list with the names and addresses of any natural persons who gave a guarantee without consideration to the company.

The balance sheet includes an overview of all assets and liabilities in accordance with the accounting legislation; an overview and estimate of all tangible property (movables and real estate); an overview of all accounts receivable and accounts payable; an overview of the profit and losses; the last profit and loss account properly closed; and an overview of payments. All these documents have to be certified as being genuine and must be signed and dated by the company. In practice, this means that the board of directors should approve these documents and have them signed by directors authorized to represent the company.

The file is usually accompanied by a request setting out the reasons why the company is in state of bankruptcy. It is advised to add to the file any evidence to support this claim.

Adjudication of Bankruptcy and Appointment of a Receiver

Bankruptcy Judgment

The court will verify whether the petition for bankruptcy is formally valid and whether the conditions for bankruptcy are met. If both are confirmed, the court will declare the company bankrupt. The bankruptcy judgment has an immediate effect, as of “hour zero” of the day on which it is issued.

The bankruptcy judgment can be appealed by the company itself (in cases where a third party requested the bankruptcy). Interested third parties (such as directors, shareholders, or conceivably even creditors or employees) can oppose the bankruptcy judgment. An appeal or third-party opposition has no influence on the effects of the bankruptcy judgment until it is revoked.

The Receiver

As of “hour zero” of the day on which the bankruptcy is declared by the Commercial Court, a receiver in bankruptcy (*curator/curateur*) is appointed to assume all responsibilities from the board of directors and other corporate organs. The court has absolute discretion regarding the identity and the number of receivers appointed; however, the receiver has to be a licensed insolvency practitioner registered on the list of receivers held by the court. For bankruptcies of large companies, it is not unusual to appoint a committee of receivers. For bankruptcies of a certain size, courts are likely to appoint receivers with experience and/or expertise in the industry concerned.

The court will also appoint a judge-commissioner to supervise the receiver. The judge-commissioner is typically a lay judge: a person who is not a full-time magistrate or even a lawyer, who is often involved in business himself, and who assists the professional magistrates of the Commercial Court.

As of his appointment, the receiver will physically visit the premises of the company and seize control over all its assets, accounts, archives and information.

The receiver’s task is to compile an inventory of all debts of the company, even if not yet due, to sell off the (remaining) assets of the company and to pay the creditors, according to their legal or contractual priority rights.

As of “hour zero” of the day of bankruptcy, the company loses every power over its assets and liabilities. The receiver has full control over the company, only subject to the oversight of the court and the judge-commissioner. To seize control should be taken literally: the receiver will, as a rule, control the keys, access codes, bank accounts, etc. While the board of directors and the shareholders’ meeting formally remain in place, they no longer have any power or influence over the company. Again, this should be taken literally: unless with the permission of the receiver, directors will not be

allowed to enter the premises of the company, use their company laptops or cell phones, or log in on the computer systems. Directors have a duty to cooperate with the receiver.

Further Procedure

The creditors must file a declaration of their claim on the company with the receiver. Any disputes regarding these claims will be decided by the Commercial Court.

The involvement of the creditors in the administration of the bankruptcy estate is limited.

At the end of the proceedings, the receiver uses the proceeds of the liquidation to pay the creditors in the order of their priority, and the bankruptcy proceedings will be closed. The company will then cease to exist.

Bankruptcy proceedings, especially in the case of important companies, can take several years, particularly if the receiver decides to continue the company's activities or if he files civil or criminal suits against third parties, such as former directors or shareholders.

This Guide does not elaborate on matters involving a bankruptcy that are of a more procedural nature.

Consequences of Bankruptcy

As of the declaration of bankruptcy, individual creditors can no longer enforce their claims on the company's assets. Attachments are automatically lifted and measures to enforce judgments are suspended. This prohibition to continue enforcing claims also applies to (most) secured creditors, who may be forced to wait one year before obtaining payment of their claim. All creditors must file an application to have their claims and receivables included amongst the claims of the bankruptcy estate.

In principle, the receiver will sell all assets of the company with a view to applying the proceeds of such sales towards payment of the creditors of the company.

As a rule, bankruptcy results in the cessation of all the company's activities. At the request of the receiver or any interested party complying with certain conditions, the court may authorize the temporary continuation of (all or part of) the company's activities under the supervision of the receiver. The court will grant that authorisation only if there is a reasonable chance that the business can be sold as a going concern at a higher price than the expected proceeds of the sale of the individual assets.

In principle, the bankruptcy does not trigger the termination of the contractual rights and obligations of the bankrupt company that are still in force on the date of bankruptcy, unless these contracts are contracts *intuitu personae* (i.e. contracts in which the identity of the performing party is a substantial element for the other party) or contracts with an explicit cancellation clause. The receiver rules on the continuation of the contracts.

Costs of Bankruptcy

The court fees for the filing for bankruptcy are nominal. If bankruptcy is declared, these costs become costs of the estate.

The main costs of bankruptcy are the fees of the receiver(s) (which are calculated partially as a function of the work performed (hourly rates) and partially based on the proceeds that the receiver can recover for the creditors) and any expenses incurred by the receiver on behalf of the administration of the estate. This includes any liabilities resulting from the continuation of the activities of the company.

Costs of the estate have priority over the other claims of other creditors.

Judicial Reorganisation

New Act on Continuity of Undertakings

On 20 January 2009, the Belgian Parliament approved the new Act on the Continuity of Undertakings (the "**Continuity Act**"), repealing the previous 1997 Act on Judicial Administration and introducing a

new reorganisation procedure. To address certain shortfalls of the initial act, the Continuity Act was amended in 2013.

While the judicial administration was not widely used under the 1997 Act, it is the ambition of the legislature that the new act replace bankruptcy as the "default" procedure for a company threatened with, or in a situation of, insolvency.

Overview of Reorganisations under the Continuity Act

The Continuity Act offers companies four routes by which to maintain continuity:

- An amicable agreement (*minnelijk akkoord/accord amiable*);
- A judicial reorganisation by way of amicable agreement (*gerechtelijke reorganisatie door een minnelijk akkoord/ judiciaire par accord amiable*);
- A judicial reorganisation by way of collective agreement (*gerechtelijke reorganisatie door een collectief akkoord/judiciaire par accord collectif*); and
- A judicial reorganisation by way of transfer under judicial authority (*gerechtelijke reorganisatie door overdracht onder gerechtelijk gezag/ judiciaire par transfert sous autorité de justice*).

The first route of the amicable agreement is essentially the same as a private agreement entered into by the company and all or some of its creditors in respect of its indebtedness. As with a private agreement, it is not binding on creditors who are not party to the agreement. The difference is that certain payments made pursuant to the amicable agreement (which must be registered with the Commercial Court) enjoy protection against challenges under certain provisions of the Bankruptcy Act on challengeable transactions in case of a subsequent bankruptcy.

The three alternative judicial routes are outlined under "Three Judicial Routes" below. They are jointly referred to as "judicial reorganisation".

Conditions for Opening a Judicial Reorganisation

A request for judicial reorganisation can be made if there is a real threat that the company will cease to trade (threat of discontinuity of the business). This will be presumed in cases of capital impairment (when, as a result of losses, the net assets of the company are less than 50% of the share capital of the company).

The threat of ceasing to trade does not have to be immediate.

A judicial reorganisation can also be granted where a company is in a bankruptcy situation.

If the company has made a request for judicial reorganisation in the past three years, the only new request it can make is for a judicial reorganisation by way of transfer under judicial authority. Furthermore, if a judicial reorganisation was granted in the period between five and three years before the new request, any new reorganisation procedure may not prejudice the rights of creditors obtained during the initial procedure.

Where manifest and serious shortcomings of the board of directors or the shareholders' meeting of the company endanger its ability to continue to trade, and where the appointment of a judicial administrator can safeguard the company's ability to continue to trade, the Continuity Act allows any interested third party (such as creditors or employees) to request in a summary proceeding that the court appoint a judicial administrator.

When Should the Company File a Request for Judicial Reorganisation?

There is no obligation on the company to file a request for judicial reorganisation where the conditions for such proceedings apply.

In theory, directors can be held liable for the failure to file such a request if it can be demonstrated that the failure has caused damages to the company or its creditors. Cases imposing directors' liability solely on this ground were rare under the previous regime of judicial administration; however, the increased flexibility offered under the new Continuity Act might, in practice, lead to a lower threshold for holding directors liable.

If the discontinuity of the activities is a real threat, it is advisable that the board of directors investigate the feasibility of a judicial reorganisation and make a motivated decision.

Who should File the Request for Judicial Reorganisation?

Board of Directors

The authority to file for judicial reorganisation lies with the board of directors of the company. The board of directors must take the decision and can give a proxy to one of the directors or a third party to file for judicial reorganisation.

It can be argued that the shareholders' meeting does not have to approve the decision to file a request for judicial reorganisation. It is, however, advisable that they obtain, if feasible, shareholders' approval prior to filing for judicial reorganisation.

As a matter of law, the shareholders' meeting cannot instruct the board of directors or another agent to file a request for judicial reorganisation.

Public Prosecutor and other Third Parties

The public prosecutor and any other third party with a legitimate interest can start a judicial reorganisation by way of transfer under judicial authority by summoning the company before the Commercial Court.

How to File the Request for Judicial Reorganisation

Where?

The request for judicial administration must be filed with the registrar of the Commercial Court that has jurisdiction over the registered office of the company at the time of the request, and must be drafted in the official language of that court.

Documents to be Provided

The Continuity Act provides a list of items to be included in the request, failing which the request will be denied:

- A summary of the events giving rise to the request for judicial reorganisation, demonstrating that the continuity of the company is immediately or in the future under threat;
- An indication of the goal(s) the company wants to accomplish with the judicial reorganisation;
- The electronic address of the company (as referred to in the Belgian Judicial Code);
- The two most recent financial statements of the company (that should have been filed according to the articles of association and, if applicable, the financial statements relating to the last financial year that have not yet been filed);
- A balance sheet setting out the assets and liabilities of the company and an income statement not older than three months, drawn up under the supervision of an auditor, external accountant/bookkeeper or an external licensed bookkeeper or tax consultant;
- A simulation of cash flows for at least the requested duration of the suspension period, drawn up with the collaboration of an auditor, external accountant/bookkeeper or an external licensed bookkeeper or tax consultant;

- A complete list of the creditors of the company (including persons who allege to be creditors), with their names, addresses, claims and, if applicable, reference to any security or legal privilege;

- Any measures or proposals contemplated: to restore the profitability and solvency of the company; to implement a social plan, if any; and to pay off the creditors;

- An indication that the company has fulfilled its legal or contractual obligations to inform or consult the employees or their representatives; and

- Additionally, the company can also include any other documents it deems useful.

Until the court has issued a judgment granting or denying the request for judicial reorganisation, the company cannot be declared bankrupt or be forced to liquidate, and no forced sale of assets of the company will be allowed to continue. If a judicial administration is granted, this protection continues (see below).

If any of the information submitted to the court proves to be manifestly wrong or incomplete, the court can impose the early termination of the judicial reorganisation. Moreover, this is a general sanction the court can impose for any submission of information that is manifestly wrong or incomplete to the court, delegate judge (as described hereafter) or creditors during the proceedings.

Registration Fee

A request for judicial reorganisation is subject to payment of a registration fee of EUR 1,000.

Appointment of a Delegate Judge and Judgment Permitting the Judicial Reorganisation

Appointment of a Delegate Judge

Upon the filing of the request for judicial reorganisation, the court appoints a delegate judge (*gedelegeerd rechter/ juge délégué*). The delegate judge is responsible for the correct application of the Continuity Act and has the duty to inform the court of any evolution or change in the financial condition of the company.

The delegate judge can hear the company and any other person he deems necessary and can request all information required to properly assess the situation of the creditors, setting out his findings in a report.

Reorganisation File – Request for Production of Additional Documents

Any creditors and, after permission by the delegate judge, any interested third party can consult the reorganisation file and request a copy.

The court and the delegate judge have extensive powers to order the company or any third party (including the shareholders) to produce documents which are relevant to a determination of whether the conditions for a judicial reorganisation or for any other measure in the Continuity Act are fulfilled.

Judgment Permitting Judicial Reorganisation

The court will hold a hearing on the request for judicial reorganisation within 14 days of the request being filed.

The company is summoned three days in advance of the hearing. The hearing takes place in chambers, unless the company requests otherwise.

The court must make its decision within eight days of the hearing.

If the court grants the judicial reorganisation, it must determine the duration of the suspension period, which cannot exceed six months. However, upon report by the delegate judge, the court can extend the suspension period by no more than 12 months from the date of the judgment granting the

suspension. In extraordinary circumstances, the suspension period can be extended by an additional six months. An extension of the suspension period must be requested at the latest 14 days before its expiry. If a judicial reorganisation by collective agreement was requested, the court also sets the date for the voting on the reorganisation plan.

Upon the request of the company or any other third party with an interest, the court can appoint a judicial mandatee (*gerechtsmandataris/mandataire de justice*) to assist the company in its reorganisation. The courts have not yet, to our knowledge, established lists of judicial mandatees, but it can be reasonably expected that the list will mainly consist of insolvency practitioners.

Upon the request of any third party or the public prosecutor, the court can also appoint one or more judicial mandatees for the term of the reorganisation if the company (or any of its bodies) commits a manifestly serious shortcoming.

If the company (or any of its bodies) commits a manifestly serious wrongdoing or has shown signs of bad faith, the court can, upon the request of any third party or the public prosecutor, appoint a provisional administrator for the term of the reorganisation. The provisional administrator replaces the existing bodies of the company.

Effects if Reorganisation is Granted

Bankruptcy Protection

Once judicial reorganisation is granted (and until it would be revoked), the company cannot be declared bankrupt or be forced to liquidate.

The mere fact that the company would otherwise be in a situation of bankruptcy is not in itself a reason to terminate the judicial reorganisation.

Any procedure in judicial reorganisation can be terminated before the end of the suspension period at the request of the company or by order of the court. The company can request the procedure to be terminated. The court issues a judgment after having heard the delegate judge and can decide to end the procedure in judicial reorganisation completely or partially.

The commercial court can also order the termination of the procedure in judicial reorganisation if the company is clearly unable to guarantee its continuity any further. The court can subsequently declare the company bankrupt or order the company's forced liquidation in the same judgment.

Suspension of Enforcement Rights

During the suspension period, the enforcement rights of creditors whose claims originated before the reorganisation period are suspended:

- New attachments and seizures are impossible during the suspension period;
- Attachments that were made prior to the suspension period remain in place, but the court can release these attachments upon recommendation by the delegate judge provided the release does not cause a significant harm to the relevant creditor.

The suspension period does not have any impact on the rights of privileged creditors, but they will not be able to enforce their rights during the suspension period (other than as provided for under the Act of 15 December 2004 on financial collateral, i.e. that security interests on financial instruments and on cash can be enforced at any time. However, according to the aforementioned act, pledges of cash or bank receivables are no longer enforceable during a judicial reorganisation).

The suspension period does not have any impact on receivables that were pledged specifically: those can be enforced during the suspension period, without prejudice to the court's competence to suspend such enforcement.

As a general rule, set-off between claims that originated before the start of the judicial reorganisation and those that originated after the start is not possible unless these claims are intimately linked.

The suspension does not affect any receivables pledged to a third party, save for the enforcement of pledges of cash and bank receivables.

As a rule, the suspension has no effect on co-debtors, guarantors or sureties.

Protection of Payments against Challengeable Preferences

The suspension period does not prevent voluntary payments by the company, provided that there is a connection between the payment and the preservation of the continuity of the company.

Any payments made during the judicial reorganisation cannot be challenged under articles 17, 2° and 18 of the Bankruptcy Act in the case of a subsequent bankruptcy. These provisions allow the challenge of any payments of debts that were not yet due, any payments in kind even for due debts, and any payments made to third parties who were aware that the company had generally ceased to pay its debts. Many questions regarding the interpretation of these provisions remain. While payments made during the reorganisation cannot be challenged under articles 17, 2° and 18 of the Bankruptcy Act, it would appear that they can still be challenged under article 1167 of the Civil Code, which imposes a higher threshold for annulment (i.e. proof that the debtor made the payment with the fraudulent intent to prejudice the rights of other creditors).

Effect on Existing Contracts

Judicial reorganisation does not terminate existing contracts, nor does it change the terms of their execution, regardless of any provisions in such contracts to the contrary. A default under an existing contract of the company prior to obtaining judicial reorganisation cannot be used to terminate such a contract, unless the company does not remedy the default within 15 days after being formally notified thereof.

The company can opt not to continue a contract for the duration of the suspension period if the non-continuation is necessary for the reorganisation plan or the transfer under judicial authority. Any damages as a result of such termination have the same status as claims which originated prior to the judicial reorganisation. This option does not, however, apply to labour contracts.

Penal clauses or clauses providing lump sum damages (including increases in the applicable interest rate) are unenforceable during the judicial reorganisation until the reorganisation plan has been fully executed *vis-à-vis* the creditors affected by the plan. If a creditor claims actual damages, he is deemed to have forfeited his rights under a penal clause providing lump sum damages (even after the execution of the reorganisation plan).

Any claims under existing contracts which continue to be performed during the reorganisation (including claims for conventional interest) are not subject to the suspension of creditors' rights, provided those claims relate to the period following the start of the judicial reorganisation.

Subsequent Bankruptcy or Liquidation

Contractual claims can become "costs and expenses of the estate" in a subsequent bankruptcy or liquidation, provided that:

- They relate to the period following the start of the judicial reorganisation; and
- There is a close link between the bankruptcy or liquidation and the end of the judicial reorganisation.

It remains unclear whether claims other than contractual claims can become costs and expenses of the estate.

Three Judicial Routes

In principle, the company must choose one of the three available judicial routes in its request for judicial reorganisation. However, during the suspension period, the company is able to request that the court change the procedure either: from a judicial reorganisation by way of amicable agreement

into a judicial reorganisation by way of collective agreement or by way of transfer under judicial authority; or from a judicial reorganisation by way of collective agreement into a judicial reorganisation by way of transfer under judicial authority. Recently, following a partial transfer of its estate via judicial reorganisation by way of transfer under judicial authority, the company is also allowed to suggest a reorganisation plan for the balance of its estate.

Judicial Reorganisation by Way of Amicable Agreement

This procedure is similar to the amicable agreement described. The company can enter into an agreement with all, or two or more, of its creditors in respect of its indebtedness. Articles 17, 2° and 18 of the Bankruptcy Act will not apply in a subsequent bankruptcy (see the above paragraph on "Protection of Payments against Challengeable Preferences").

This differs from a normal amicable agreement as there is supervision and assistance from a delegate judge and a judicial mandatee. The agreement is also not registered with the court, but accepted by the court and published in the Belgian Official Gazette.

Judicial Reorganisation by Way of Collective Agreement

Under this procedure, the company presents a reorganisation plan to its creditors, who then vote on the plan.

The plan needs to contain a proposition to reorganize the company. The plan must have a descriptive section which sets out the difficulties of the company, and a section that provides for possible solutions.

The plan can provide for instalment periods, debt reduction and transfer of debt into equity. The plan can also provide for the transfer of all or part of the business of the company and for the suspension of the enforcement rights of privileged creditors for a duration of 24 months (which can be extended for an additional 12 months).

The duration of the plan cannot exceed five years. The judicial mandatee (if appointed) assists in drafting the reorganisation plan.

The company must provide a list of its creditors to the court, which will verify the list and, upon the report of the delegate judge, determine who the creditors of the company are and the amount of their claims (the "creditors in suspension"). During the suspension period, the court can, at the request of the company or one of its creditors, decide to alter the list of creditors in suspension or the amounts of their claims.

The creditors in suspension vote on the reorganisation plan. The plan is approved if at least half of the creditors in suspension representing at least half of the total indebtedness of the company agree to the reorganisation plan. The holders of special privileges or security interests (such as pledgees or mortgagees) need to give their individual consent if their rights are affected by the plan. Some claims cannot be waived in the reorganisation plan. These include criminal fines and claims relating to labour performed before the opening of the proceedings.

The plan is then approved by the court. The court can refuse to approve the plan only if the provisions of the Continuity Act were not respected or if the plan violates public policy. The court can also allow the company to submit an adjusted reorganisation plan to the creditors. The decision of the court is published in the Belgian Official Gazette.

Disputed claims that are judicially recognised after the approval of the plan by the court will be treated in the same manner as similar claims of creditors in suspension.

If the company complies with the provisions of the plan, it will be released from all claims of the creditors in suspension. Any creditor of the company can request the cancellation or annulment of the plan if the company does not comply with its provisions.

Judicial Reorganisation by Way of Transfer under Judicial Authority

The transfer of all or part of the business can be ordered by the court upon request of the company.

The court can also order the same upon request of the public prosecutor if:

- The company is in a state of bankruptcy without having filed for judicial reorganisation;
- There is an early termination of the procedure in judicial reorganisation;
- The creditors do not approve the reorganisation plan; or
- The court refuses the approval of the reorganisation plan.

If the company requests a transfer, the employee representatives of the company must be consulted.

A transfer will be without effect on the labour contracts in existence (they will transfer with all or the part of the business that is transferred) unless the employee representatives agree otherwise.

The transferee decides which employees are transferred as part of the transfer under judicial authority. His decision must be based on technical, economical and organisational grounds.

The transferee, the transferor or the judicial mandatee can request the Court of Labour to confirm ("homologate") the transfer.

The judgment ordering the transfer also appoints a judicial mandatee who is responsible for realising the transfer. He organizes the transfer and must strive to keep all or part of the activities together, whilst taking into account the rights of the creditors. The judicial mandatee can request concrete evidence on employment matters and the payment of the purchase price as well as financial and business plans or projects. He will draft one or more sales agreements to present to the delegate judge and the court. The court must authorise the judicial mandatee to continue the sale or sales.

If a draft sales agreement proposes a number of different buyers or different terms, the court must decide between them. In the event of similar offerings, the judicial mandatee (and not the court) will give preference to the offer that guarantees the maintenance of employment through a social agreement.

If a person that supervises (i.e. exercises control over) the company or has supervised the company, and via another legal person simultaneously has control over rights that are necessary to preserve the continuity of the activities of the company, offers to purchase the company's estate, that offer can only be taken into account conditionally upon the rights being accessible to the other bidders. It is not clear whether change of control clauses are affected by this measure.

The purchase price for the estate may not be lower than its presumed value if the business will be discontinued.

If real estate is to be sold, the company or its creditors with a privileged right on the real estate can request that the court impose certain conditions on the sale of that real estate, such as a minimum price.

If the judicial mandatee believes the transfer has been finalised, he requests the court to declare the judicial reorganisation closed and to relieve him of his duties.

Voluntary Liquidation

Conditions for Liquidation

The shareholders' meeting of a company can decide at any time to voluntarily dissolve the company. After a liquidation, the company will cease to exist.

No specific conditions as to the state of the company apply for a voluntary liquidation. In theory, it is conceivable that an interested third party will ask for the nullification of a decision to dissolve and liquidate, on the grounds that it is not in the corporate interest.

Case law allows the voluntary liquidation of a company, even if it appears that the liabilities will exceed the assets. Furthermore, the courts apply the conditions for bankruptcy differently in the case of a company which is in voluntary liquidation: as long as the creditors generally remain confident that the liquidator is prudently and honestly performing its duties, the courts may not declare the company bankrupt, even when it has stopped making payments.

In certain circumstances, third parties can apply to the court for the forced dissolution and liquidation of the company.

Liquidation Procedure

Preparation of Reports

The board of directors prepares a special report in which it justifies its proposal to dissolve the company. The board of directors must attach to its report a balance sheet of the company that is less than three months old at the date of the shareholders' meeting referred to below. This balance sheet must be established in accordance with generally accepted accounting principles in Belgium ("Belgian GAAP") taking into account that the company will be liquidated (and will no longer operate as a going concern).

The statutory auditor of the company must review the aforementioned balance sheet and indicate in a special report whether the balance sheet gives a complete, true and fair view of the company's financial situation.

Extraordinary Shareholders' Meeting

Subsequently, the board of directors convenes, at a time and date decided at the discretion of the board, an extraordinary general shareholders' meeting of the company which is to be held before a Belgian Notary Public. At this meeting, the shareholders will consider a resolution to dissolve the company (i.e. put it into liquidation) and appoint the liquidator(s).

Confirmation by the Court of the Appointment of the Liquidator(s)

The appointment of the liquidator(s) must be confirmed by the court of the district where the company has its registered office on the date of the dissolution.

For this purpose, a unilateral request must be filed with the Commercial Court. The practice of the courts depends on the district, but generally this request must include:

- A balance sheet of the company (the same balance sheet as attached to the special board report referred to above can be used), to be signed by the liquidator;
- A copy (certified by the Notary) of the notarial deed recording the minutes of the shareholders' meeting referred to above;
- A certificate of the good behaviour of the liquidator (i.e. the Belgian *bewijs van goed gedrag en zeden* or a similar document under the laws of the nationality of the liquidator(s)); and
- A declaration on honour by the liquidator that he has never been declared bankrupt.

The court will confirm the appointment only after verifying the integrity of the liquidator(s). If the court refuses to confirm the appointment of the liquidator(s), it will appoint another liquidator, possibly upon proposal of the general shareholders' meeting.

The liquidator can take actions between his appointment by the shareholders' meeting and the confirmation of his appointment by the court, but such actions subsequently need to be confirmed by

the court. The court can refuse such confirmation and declare all or some of these actions null and void if it finds that they constitute a manifest breach of the rights of third parties.

In practice, the court's judgment is normally passed within a period of two to three business days following the submission of the unilateral request.

Filing and Publication

The notarial deed recording the shareholders' resolutions to dissolve the company and to appoint the liquidator(s) must be filed as soon as possible with the office of the clerk of the court. This can be validly done only if a copy of the court's decision to confirm the appointment of the liquidator(s) is attached to such notarial deed.

An excerpt from the notarial deed will subsequently be published in the annexes to the Belgian Official Gazette.

Liquidation Process

During the liquidation process, the liquidator(s) must sell the assets and pay the debts of the company. Any net liquidation proceeds are paid to the shareholders of the company.

To the extent that the liquidation is not yet closed at that time, the liquidator must submit, in the sixth and twelfth month of the first year of the liquidation process, a detailed statement of the company's liquidation status to the office of the clerk of the Commercial Court. This statement must include the income and expenses, the distribution to creditors, an overview of the outstanding debt, etc. As of the second year of the liquidation process, this statement must be submitted only once a year.

Closing of the Liquidation

Once the aforementioned liquidation process is completed, the liquidation can be closed. As long as the liquidation is not formally closed, the dissolved company will legally continue to exist as a legal entity. The liquidation is normally closed when all liabilities and legal claims against the company are settled.

When the liquidator(s) have completed the liquidation process, they must prepare liquidation accounts, which must be audited.

The liquidator(s) must also prepare a plan for the distribution of the assets to the different creditors and submit this plan to the court for approval. Although no specific formalities are prescribed by law, the submission is normally made by means of a unilateral request. The court can request the liquidator(s) to provide additional information in order to verify the validity of the plan. The liquidation can be closed only when the court's approval of the plan has been obtained.

Shareholders' Meeting/Resolutions

Subsequently, the liquidation accounts and the underlying justification documents must be submitted to a shareholders' meeting. This meeting does not need to be held before a notary public (and can be organized by means of unanimous and written resolutions), unless the assets to be distributed would include real estate.

At least one month prior to the meeting, the liquidator(s) must deposit the liquidation accounts and justification documents at the registered office of the company. (In practice, most legal doctrine agrees that this period of one month can be waived by the shareholders, provided that all shareholders agree to such waiver.)

Post-Closing

For a period of five years following the closing of the liquidation, the liquidator(s) may still be held liable by third parties for mismanagement.

The shareholders' resolution to formally close the liquidation must be published in the annexes to the Belgian Official Gazette.

Effects of a Decision of Dissolution and Liquidation

The decision to dissolve the company does not itself end the corporate existence of the company or the continuity of its activities.

As a rule, the rights of the creditors and the agreements in place remain unaffected by the dissolution. In case of an insolvent voluntary liquidation, the dissolution can, however, have effects similar to that of a bankruptcy. In particular, the creditors' execution rights will be suspended and the liquidator can only take any actions to the extent that they respect the priorities between the creditors and the equality between the unsecured creditors.

Costs of a Voluntary Liquidation

Small fees must be paid in order to have the unilateral request recorded and make the required publication.

The costs of the notary should normally be less than EUR 1,500. The main costs are those arising from the sale of the assets, including the fees of the liquidator(s), who will normally be paid on an hourly basis.

Dissolution and Liquidation on Same Day

It is possible to voluntarily dissolve and liquidate a company on one and the same day, provided that certain conditions are met, specifically the absence of outstanding debts and a unanimous resolution of the shareholders' meeting, and without prejudice to certain reporting requirements.

Summary Overview of Priorities between Creditors

Costs and Expenses of the Procedures

In the case of bankruptcy, the proceeds of the sale of the assets of the bankrupt estate are first used to pay the costs and expenses related to the management of the bankruptcy estate. Costs of the estate include any liabilities incurred by the bankruptcy trustee in the continuance of the activities of the company.

In the case of the voluntary dissolution of an insolvent company, the same rule applies to the costs and expenses incurred by the liquidator.

No similar rules apply in case of a judicial administration, but costs made with the authorisation of the court commissioner during the period of payment suspension can receive the same priority as the costs of the bankruptcy estate in cases where the judicial administration ends in bankruptcy.

Priorities

Creditors with a security interest (such as a mortgage or a pledge) or privileged creditors are paid before unsecured creditors.

Privileged creditors may benefit from a "general" or a "special" privilege:

- A general privilege entitles the holder to a certain priority at the distribution of the proceeds of all assets. A general privilege holder cannot interfere with the liquidation procedure and will enjoy priority at the moment of the distribution of proceeds, if any;

- A special privilege is always related to one or more specific assets of the bankrupt estate. The holder of a special privilege is entitled to a prioritized payment out of the proceeds of the specific asset and can, in a number of cases, evade the suspension of creditors' enforcement rights in cases of bankruptcy or a similar situation.

Examples of special privileges are, among others: the privilege of the unpaid lessor; the privilege of the unpaid seller; the privilege of the subcontractor; and the privilege of the Work Accident Reserve Fund.

Examples of general privileges on all movable assets are, mainly, the “social” privileges and the privileges of the tax authorities. The social privileges include, among other things: the net wages of employees; the claims of the Company Closure Fund (severance pay); claims for holiday contributions and bonuses; claims of work accident victims; the privilege of the social security authority; and the privilege of the Occupational Diseases Fund. The privileges of the tax authorities deal with both direct and indirect taxes.

There has been a proliferation of privileges and the ranking order of priorities is a complicated area of law, of which this Guide can only give a flavour.

By way of general rules:

- Creditors with a security interest or a special privilege are paid before the costs and expenses of the bankruptcy estate, unless they benefited from those costs and expenses;
- Creditors with a security interest and special privilege holders prevail over a general privilege holder;
- A conflict between a creditor with a security interest and a special privilege holder on the same asset will generally be decided by the date on which the security interest or privilege originated or was perfected; and
- General privilege holders prevail over unsecured creditors.

Proportional Distribution

If any assets remain, the proceeds are distributed proportionally amongst the unsecured creditors.

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