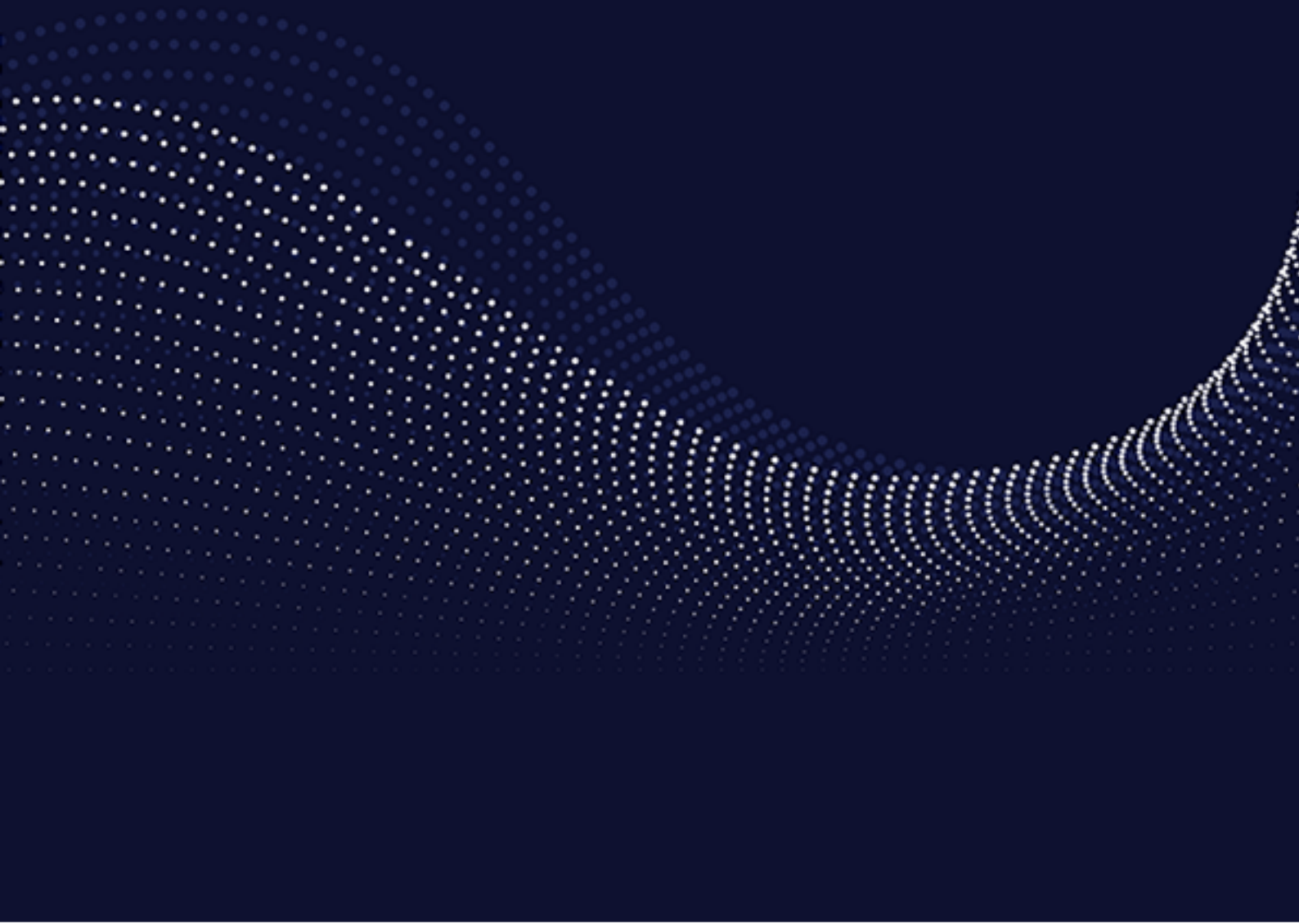
LEXOLOGY
Getting The Deal Through

INSOLVENCY LITIGATION

Belgium



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Belgium

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COMMENCING PROCEEDINGS

Litigation climate

How would you describe the general climate surrounding insolvency litigation in your jurisdiction? What are the most common sources of dispute? To what extent is litigation used as a pressure or delay tactic?

In Belgium, insolvency litigation usually emanates either from the appointed bankruptcy trustees who seek to increase the bankruptcy estate (eg, by bringing claims against creditors based on fraudulent conveyance or liability claims against former directors, including shareholders acting as de facto directors, for mismanagement), or from creditors who seek to protect their rights in the bankruptcy proceeding (eg, to obtain confirmation of the amount or the secured nature of their claim). As bankruptcy trustees are paid out of the proceeds of the assets they realise for the benefit of the bankruptcy estate, they may be open to amicable settlement where the outcome of a court proceeding is uncertain.

Sources of law

What key sources of law form the basis of claims arising from insolvency? How does the insolvency regime interact with other laws?

In Belgium, substantive insolvency law is mainly governed by Book XX of the Belgian Code of Economic Law. Book XX includes, in particular, rules on judicial reorganisation (which is a rescue proceeding) and bankruptcy (which is a liquidation proceeding).

Book XX is the legal basis for various insolvency-related claims, such as claims for fraudulent conveyance or directors' liability for gross and manifest negligence having contributed to the bankruptcy or for wrongful trading. In addition to Book XX, claimants can also base a claim on certain provisions contained in the Belgian Civil Code (eg, article 5.243 (***actio pauliana***) or article 1382 (tort liability)) or in the Belgian Code of Companies and Associations (eg, founders' liability or liability of the liquidator). Finally, the Belgian Criminal Code provides for various criminal offences related to the state of bankruptcy (eg, misappropriation of company assets).

Procedure

What procedural rules govern insolvency litigation in your jurisdiction? What common procedural hurdles arise in practice?

Insolvency litigation is mainly subject to the general rules of civil procedure as laid down in the Belgian Judicial Code. Book XX of the Belgian Code of Economic Law, however, provides for certain procedural rules specific to insolvency litigation and that prevail over the general rules of civil procedure. The main aim of such deviations is to promote the speed at which court proceedings are settled and to avoid certain parties unlawfully impeding the court process. These deviating procedural rules include, among others, restrictions to the possibility to appeal, shortened appeal time limits, the mandatory involvement of the trustee, the filing of procedural documents in the digital insolvency register (RegSol) and specific jurisdictional rules.

Courts

Which courts hear insolvency claims? How experienced are they with insolvency litigation?

In principle, insolvency claims are heard by the enterprise courts. In each enterprise court, there are specialised insolvency chambers. These chambers are chaired by a professional magistrate and two lay judges with relevant professional experience. Lay judges do not necessarily hold a law degree. They often come from the business world and may pursue both activities in parallel. They assist the professional magistrates by imparting their relevant know-how and field insights.

Jurisdiction

Through what law do the relevant courts have jurisdiction to hear insolvency claims? Does jurisdiction differ for domestic and cross-border matters?

A court's subject matter and territorial jurisdiction are determined by statute law (ie, Book XX of the Belgian Code of Economic Law or the Belgian Judicial Code). In cross-border insolvency matters, the Belgian courts may have international jurisdiction through Regulation (EU) 2015/848 dated 20 May 2015 or, when Regulation (EU) 2015/848 is not applicable, the Belgian Code of Private International Law.

Jurisdiction to open main insolvency proceedings does not differ for domestic and cross-border matters. In both cases, the court having jurisdiction is the enterprise court of the place of the centre of main interests (COMI) of the debtor. For companies and legal entities, the COMI is presumed to be the place of the registered office.

The enterprise court also has jurisdiction to hear all claims and disputes arising directly from insolvency proceedings and for which the rules applicable for their resolution are laid down in the specific insolvency laws. These claims and disputes include, among others, disputes regarding the admission of creditors' claims in the bankruptcy proceedings and their ranking and claims from bankruptcy trustees to declare certain acts unenforceable against the general body of creditors. A claim for directors' liability, on the other hand, follows the ordinary jurisdiction rules insofar as the claim is based on ordinary liability law or company law. A similar rule applies under Regulation (EU) 2015/848, which provides that the courts of the member state where insolvency proceedings have been opened also have jurisdiction for any action that derives directly from the insolvency proceedings and is closely linked with them.

Limitation periods

What limitation periods apply to bringing insolvency-related claims? Are there any notable exceptions?

Creditors must file their claims within the time limit indicated in the bankruptcy judgment that is published on the digital insolvency register RegSol and in the Belgian Official Gazette. If a creditor fails to file their claim within this time limit, they may still file later, but they have

no right to the distributions that, in the meantime, have already been ordered. The right for a creditor to file a declaration of claim in the bankruptcy estate becomes time-barred one year from the date of the bankruptcy judgment.

Contractual claims become time-barred after 10 years. Tort claims become time-barred five years after the day on which the injured party became aware of the damage or the aggravation thereof and the identity of the liable party and, in any event, 20 years after the event causing the damage. The Belgian Code of Companies and Associations provides for a shortened limitation period of five years for claims provided therein against, for example, founders, shareholders and (de facto) directors.

Interim remedies

What interim remedies are generally available and commonly deployed in insolvency proceedings? How are these used as part of claimants' overall litigation strategy?

Interim remedies typically available in general litigation proceedings are also available in insolvency proceedings and include, for example, the investigation by an accountant or expert, the appointment of an interim administrator, or the appointment of a judicial custodian, usually a bailiff, who takes possession of particular assets to ensure they are not disposed of, used or dissipated. In Book XX of the Belgian Code of Economic Law, some specific interim remedies are provided for in an insolvency context, all with a focus on the (interim) management of a company in financial difficulties, such as the request from interested parties to appoint, under certain circumstances, a judicial or interim administrator.

Finally, creditors can also take measures to safeguard their debtors' (secured) assets for future enforcement in a pre-insolvency stage (ie, when financial difficulties arise but no formal insolvency proceedings have been opened yet). This is typically done by way of laying a conservatory attachment, which can be done by a creditor who has a due, certain and fixed claim and when the financial situation of the debtor is critical.

Evidence

What rules and procedures govern the collection and admissibility of evidence in insolvency litigation? To what extent is expert witness testimony allowed? What common evidential issues should claimants be aware of?

The collection and admissibility of evidence in insolvency litigation is not governed by specific insolvency laws but rather by the general rules of procedure in civil matters. Expert witness testimony may be allowed but is uncommon as litigation in Belgium is highly dependent on written evidence. The Belgian rules of civil procedure do not provide for discovery. It is, in principle, up to each party to submit evidence to substantiate its claims, although there is a general obligation to cooperate in the production of evidence. In certain exceptional cases, the court may reverse the burden of proof. A party who has reason to believe its opponent possesses a document relevant to the resolution of the dispute may request the court to order its opponent to submit that document, as the case may be, under penalty payments.

Time frame

What is the typical time frame for insolvency claims?

In general, first instance court proceedings on the merits relating to insolvency claims take around 12 to 18 months. The actual timing will, however, depend on many factors, such as the number of parties involved, the complexity of the matter, the cross-border nature of the dispute and the workload of the court. It is generally possible to obtain within a relatively short time frame urgent protective or conservatory measures.

Appeals

What are the requirements to appeal insolvency-related judgments? What is the typical time frame for appeals?

Under the ordinary rules of civil procedure, a party may, in principle, appeal any court decision to the extent it was grieved by the first judge's decision and within one month of the service thereof. It does not need to obtain leave to appeal. Both the creditor and the debtor can appeal decisions, as well as, in some cases, the public prosecutor. The Belgian Code of Economic Law, however, provides for certain restrictions to the possibility of appeal and shortened appeal time limits. For example, the time limit to appeal against a judgment opening a bankruptcy proceeding is 15 days from the publication in the Belgian Official Gazette. The time frame for appeals is similar to first instance court proceedings. In some cases, appeal proceedings can, however, take up to several years.

Costs and litigation funding

How are costs handled and how are claims funded? Can claimants obtain third-party funding to finance the prosecution of claims?

A claimant must only pay limited costs when bringing a claim. These costs include the costs for the service of the summons and limited court fees.

The prevailing party is entitled to a lump sum compensation for its legal fees at the expense of the unsuccessful party. The amount of the compensation depends on the value of the claim. The law provides for a base amount that, under certain conditions, can be increased or decreased. The maximum amount that a prevailing party could currently claim is limited to €45,000 (ie, for claims exceeding €1 million). Prevailing parties are not entitled to the reimbursement in full of their costs and legal fees.

Although legal scholars generally accept that third-party funding is valid under Belgian law, the validity has so far not been reviewed by Belgian courts, and the use has remained limited.

The costs and fees to which bankruptcy trustees are entitled are calculated as a percentage of the assets they realise for the benefit of the bankruptcy estate. In addition, bankruptcy trustees are entitled to a separate fee if, due to their actions, real estate encumbered with a mortgage or immovable privileges was sold.

AVOIDANCE ACTIONS

Fraudulent transfers and undervalue transactions

What are the essential elements of avoidance actions seeking to claw back fraudulent conveyances and transfers? Can actions be brought for transfers without fraudulent intent based on undervalue of the transfer?

Pursuant to the Belgian Code of Economic Law, certain acts may (and sometimes must) be declared unenforceable by the enterprise court if they were performed by the company at a time when it had already ceased its payments (ie, during the hardening period). A hardening period, which is the exception and not the rule, can only be put in place by the court when there are clear indications that the debtor has already persistently ceased its payments before the date of the court decision opening the bankruptcy proceeding. The date of cessation of payments can be brought back a maximum of six months prior to the bankruptcy judgment, except if a company was wound up more than six months before the bankruptcy order. In that case, the date of cessation of payments can be brought back to the date of the winding-up of the company if the winding-up was done to the prejudice of its creditors.

The following actions must be declared unenforceable if performed during the hardening period:

- transactions without consideration or sub-value transactions;
- payments of undue debts;
- payments in kind of due debts; and
- security interests granted for pre-existing debts. All other payments for outstanding debts and all acts for valuable consideration that took place during the hardening period may be declared unenforceable if the debtor's contractor knew of the cessation of payments.

Preferential rights, mortgages and pledges registered in the Belgian pledge register may be declared unenforceable if they were registered during the hardening period and more than 15 days have lapsed between the deed creating the preferential right, mortgage or pledge, and the date of their registration.

Finally, any acts or payments, whenever performed and even outside the hardening period, that are fraudulent may be declared unenforceable (***actio pauliana***).

Preference and improvement of position

What are the essential elements of avoidance actions seeking to claw back transactions and payments based on preference and improvement of position shortly before insolvency proceedings?

A debtor not facing any financial difficulties may differentiate between its creditors and prioritise payments to certain creditors over others. If a debtor is, on the other hand, in a state of bankruptcy, it is no longer allowed to privilege certain creditors to the detriment of the general body of creditors. The regime applicable to actions seeking to claw back transactions and payments based on preference and improvement of position is essentially the same as

the one set out under 'Fraudulent transfers and undervalue transactions'. As a consequence, payments made by the debtor in the hardening period set by the court, may be declared unenforceable if the receiving party was aware of the situation of cessation of payment. Fraudulent payments may be declared unenforceable whenever performed.

Finally, it should be noted that the selective payment of creditors could, under certain circumstances, be an indication that a debtor is in a state of bankruptcy, in particular when the selective payment is arbitrary.

Liens and floating charges

What are the essential elements of actions for the avoidance of liens and floating charges on subsequently acquired property?

No security interests may be perfected once a bankruptcy proceeding is opened. Avoidance actions for security interests are subject to the same rules as outlined above. As such, bankruptcy trustees may pursue the following avoidance actions:

- a security interest granted for pre-existing debt during the hardening period shall be declared unenforceable against the body of creditors;
- a security interest granted during the hardening period can be declared unenforceable if the creditor knew of the cessation of payments;
- security interests can be declared unenforceable if they were registered during the hardening period and more than 15 days have lapsed between the deed creating the security, and the date of registration; and
- a security interest, whenever granted and irrespectively if it is granted for pre-existing or new debt, can be declared unenforceable if considered fraudulent.

Process and resolution of avoidance actions

Through what process are avoidance actions litigated? What procedural issues often arise and how are avoidance actions usually resolved?

The court that opens a bankruptcy proceeding also has jurisdiction for avoidance actions. Once a bankruptcy proceeding is opened, avoidance actions may, in principle, only be exercised by the bankruptcy trustee.

Unlike in some other jurisdictions, Belgian insolvency law has no automatic hardening period. As most avoidance actions can only be made in relation to acts performed during the hardening period (except for fraud), in practice, those actions are often preceded by litigation in relation to the putting in place of a hardening period by the bankruptcy court. This requires evidence that the company had already persistently ceased its payments before the date of the court decision opening the bankruptcy proceedings.

One of the most disputed issues in avoidance action litigation relates to the evidence of the counterparty's knowledge of the cessation of payment or of the adverse impact of the transaction on the debtors' solvability. In addition, procedural issues may also arise in relation to the law applicable to avoidance actions. Pursuant to Regulation (EU) 2015/848 and the

Belgian Code of Private Internal Law, avoidance actions cannot be brought in respect of acts or transactions that are subject to the law of a state other than Belgium if the law of that state does not allow any means of challenging that act or transaction in the relevant case.

CLAIMS AGAINST DIRECTORS, OFFICERS AND SHAREHOLDERS

Breach of fiduciary duty

What are the essential elements of a claim for breach of fiduciary duty against directors and officers in the context of corporate insolvency?

Directors must exercise their role with due care and diligence. Their conduct will be compared to what can be expected from a normally careful and diligent director put in the same situation. Unlike in other legal systems, directors are not to be considered representatives of the shareholders by whom they were appointed. In making any decision, they must therefore act in the best interest of the company and not of a specific shareholder.

Directors can, in general, be held liable:

- as an agent of the company on a contractual basis; or
- for violations of the company's articles of association or the Belgian Code of Companies and Associations.
- on the basis of tort.

In addition, there are specific grounds for directors' liability in the case of insolvency.

First, in the event of bankruptcy of a company and shortfall of its assets, its directors, former directors, managing directors or any other person who had de facto authority to manage the company can be held personally liable for all or part of the company's debts up to the shortfall, if that person committed a gross and manifest negligence that contributed to the bankruptcy. Courts have discretionary power to order the directors jointly or individually to pay part or all of the company's debts. Gross and manifest negligence is an error that a normally careful and reasonable director would not have committed and that violates the essential rules of conduct of business. A strict causal connection between the negligence and the company's bankruptcy does not have to be proven; it is sufficient to demonstrate that the negligence contributed to the bankruptcy.

Second, directors, former directors, managing directors and de facto directors can also be held personally liable for all or part of the social security contributions due at the moment of opening of bankruptcy proceedings if:

- during a period of five years before the bankruptcy, they were involved with at least two bankruptcies or winding-up proceedings of companies where social security contributions remained unpaid; and
- they held management positions in those companies.

Finally, failure to make the appropriate and timely bankruptcy filing constitutes a criminal offence.

Protection from liability

To what extent does the law in your jurisdiction protect directors and officers from liability for decisions made in connection with the restructuring or insolvency?

The general regime regarding directors' liability also applies in connection with restructuring or insolvency decisions. No safe haven or specific protection is provided in the context of restructuring or insolvency procedures. On the contrary, additional grounds for liability exist in case of bankruptcy. This being said, for certain liability grounds, the court will need to take into account all relevant circumstances of the matter, which may include circumstances complicating the judgment of certain actions or choices made by the directors. Directors of a distressed company will not be exempt from liability for past decisions if they resign. In recent years, directors' and officers' insurance policies have become very common. They typically provide coverage for liability unless the insured acted fraudulently, including in the context of insolvency. Finally, directors can also seek discharge of liability by the annual general meeting of shareholders.

Converting credit to equity

Can credit extended by an insider or shareholder be recharacterised as equity? If so, what is the mechanism by which such an action is brought, and what elements are required to prevail?

Credit extended by an insider or shareholder will, in principle, not be recharacterised as equity in the event of bankruptcy. The court is, however, not bound by the qualification given by the parties to their contract. A recharacterisation of credit into equity therefore remains possible.

Finally, as part of a collective restructuring plan, the debtor may propose a debt-to-equity swap. However, such forced debt-to-equity swaps can only be imposed on secured creditors in specific situations and under strict conditions.

Illegal dividends

Can dividends received by shareholders be prosecuted as illegal?

As such, the rules in respect of dividend distributions are laid down in the Belgian Code of Companies and Associations, and insolvency law does not specifically deviate from this. However, if dividends were distributed during the hardening period or fraudulently, the bankruptcy trustee could try to have them declared unenforceable. Furthermore, the company's directors could be held criminally liable if the purpose of the dividend distribution is to make the company insolvent or to misappropriate or disguise part of the assets.

Trading while insolvent

How is trading while insolvent treated in your jurisdiction? If actionable, what mechanisms apply and what are the elements of a successful claim?

In the event of bankruptcy of a company and shortfall of its assets, its directors, former directors, managing directors or any other person who had de facto authority to manage the company (which could be the case for a majority shareholder) can be held personally liable for all or part of the company's debts up to the shortfall, if:

- at any given time prior to bankruptcy, this person knew or should have known that there was manifestly no reasonable prospect of maintaining the enterprise or its activities and avoiding bankruptcy;
- this person was a director at that time; and
- this person did not act as a normally careful and reasonable director would have acted in the same circumstances.

Courts have discretionary power to order the directors jointly or individually to pay part or all of the company's debts.

Equitable subordination

Is equitable subordination of shareholder claims allowed? If so, what requirements and mechanisms apply?

Belgian law does not provide for automatic subordination of shareholder loans. This was discussed during the preparation of the new Belgian Code of Companies and Associations but was eventually not introduced. In a number of exceptional and rare cases, courts have, however, accepted the subordination of claims, particularly about sanctioning creditors who wrongfully increased the bankruptcy estate's liabilities and hence reduced the recovery chances of other creditors.

Other claims

Are any other claims commonly brought against shareholders, directors and officers in your jurisdiction? If so, what mechanisms are used to raise these claims and what elements are required to prevail?

Shareholders can be held liable on the basis of founders' liability if, in the first three years following its incorporation, a company is declared bankrupt, and the invested capital was manifestly insufficient. They can also be held liable as de facto directors for trading while insolvent.

Further, shareholders can be held liable on the basis of tort. In this respect, case law has already accepted the liability of a parent company in circumstances where it:

- continued to finance in an unreasonable manner the loss-making activities of its subsidiary;
- attributed to its subsidiary an unlawful appearance of creditworthiness; or
- manifestly undercapitalised its subsidiary.

Shareholders may also incur liability if they issue a letter of comfort to the debtor (eg, to ensure a going-concern basis for the yearly audit) and are in breach of this undertaking. Shareholders also can bring claims against each other for breaching a shareholders' agreement. Likewise, claims may be brought by creditors against directors, officers or shareholders who provided guarantees for the debts of the bankrupt company.

Finally, depending on the circumstances, criminal offence claims could also be filed. Certain general offences may also apply in an insolvency context, such as misuse of company assets, forgery of documents (including annual accounts) and money laundering. In recent years, Belgian prosecutors have opened criminal investigations against insolvent companies and their (former) directors, officers or shareholders on suspicion of such criminal offences. In addition, the company, its (former) director, officers or shareholders can be exposed to specific bankruptcy-related criminal liability claims. These include, among others, failure to make the appropriate and timely bankruptcy filing or asset misappropriation.

Risk mitigation

How can shareholders and sponsors mitigate the risk that claims against them will be successful, and minimise the accompanying financial burden?

To mitigate the risk of successful claims and minimise the corresponding financial burden, shareholders (in particular controlling shareholders) would be well advised to regularly monitor and document the financial situation of the company or subsidiary to avoid acting as de facto directors (by respecting the decision process at the level of the insolvent company), and to carefully consider any new credit or guarantee or the early termination of any credit or guarantee.

CREDITOR ACTIONS AND STRATEGIC CONSIDERATIONS

Contesting restructuring plans

Can creditors bring actions contesting the restructuring plan? If so, what law governs such actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

A collective restructuring plan is subject to the approval of the meeting of creditors and the homologation by the court. Those rules are organised by the Belgian Code of Economic Law. In general, creditors can contest the plan either by voting against it or by requesting the court to refuse homologation. Creditors can also contest the amount or the nature of their claims, or both, as included in the restructuring plan.

The Belgian Code of Economic Law provides for two different sets of rules applicable to the content, voting and homologation of the collective restructuring plan.

- If the debtor is an SME (which has not opted-in for the below large company regime), the restructuring plan will only be approved if the majority of creditors attending the meeting of creditors vote in favour of the plan and they represent a majority of the

value of the claims. Court homologation can only be refused if the process has not been complied with or in case of violation of public policy.

- If the debtor is a large company (or an SME which opted in), a more complex regulation applies regarding the voting (based on classification and voting per class of creditors) and homologation of the restructuring plan. A restructuring plan is adopted if a simple majority is obtained in each class of affected parties. If the latter threshold is not met in each class, the court may homologate the restructuring plan if the conditions for a cross-class cram down are complied with. Under this 'large company regime', the homologation can, among others, be refused if the classification of affected parties has not been applied correctly. In addition, a dissenting creditor may also contest that, in relation to its position, the best-interest-of-creditors test is not met (ie, the dissenting creditor cannot be manifestly worse off under the collective restructuring plan than in a liquidation scenario). If new financing is provided in the restructuring plan, homologation of the plan is also subject to the condition that this new financing is necessary and does not prejudice the other creditor's rights.

Winding-up petitions

Do creditors apply for winding-up orders? If so, what law governs these actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

The Belgian Code of Economic Law allows creditors to initiate bankruptcy proceedings provided they can demonstrate the conditions for bankruptcy are met (ie, (1) the debtor has persistently ceased payments and (2) has lost the trust of its creditors). Both conditions must be met.

Cessation of payments occurs when a debtor can no longer repay its due and payable debts. It is not necessary that it has stopped all payments; it is sufficient that some important debts remain unpaid, such as social security or tax liabilities, but the cessation must be persistent. To the extent the situation of the company can still be redressed or the company still has access to sufficient credit, the company is not in a state of bankruptcy. To successfully defend against a claim in bankruptcy, the debtor must demonstrate that it has not persistently ceased payments or it has not lost its creditors' trust (or both).

For reorganisation proceedings, the Belgian Code of Economic Law allows creditors to file for a private judicial reorganisation proceeding with the aim of restructuring via a private amicable agreement or private collective agreement. Public judicial reorganisation proceedings in view of a restructuring via a public amicable agreement or public collective agreement, on the other hand, can, in principle, only be opened at the request of the company in distress. None of these proceedings, however, is as such considered a winding-up procedure.

Finally, only in certain exceptional circumstances may a creditor or interested third party request a court-supervised forced transfer of (part of) the debtors' activities. To succeed, the claimant must demonstrate:

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that the company is in a state of bankruptcy and has not filed for judicial reorganisation proceedings; or

- that previous judicial reorganisation proceedings have failed.

Following such a forced transfer procedure, the remaining company must be wound up in a subsequent bankruptcy or judicial liquidation procedure.

Stays of proceedings – scope and exceptions

Does the insolvency regime stay any creditor collection actions? If so, what are the parameters of such a stay? Are there any notable or commonly used exceptions?

A bankruptcy judgment has the effect of suspending the enforcement of individual creditors' rights. There are, however, certain exceptions to this general principle:

- for creditors holding a security interest on specific movable assets (eg, a pledge) and for mortgagees, the suspension of their enforcement rights will usually be lifted when the first minutes of verification of claims are filed by the bankruptcy trustee, a maximum of 60 days after the bankruptcy judgment. The suspension can, however, be extended to a period of one year from the date of the bankruptcy judgment; and
- pledges or security assignments of bank accounts and financial instruments that are subject to the Belgian Financial Collateral Law of 15 December 2004, as well as close-out netting agreements, will, in principle, not be affected by the opening of a bankruptcy proceeding and can thus be enforced immediately.

Public judicial reorganisation proceedings offer protection to the insolvent company against its creditors during the stay period. During this stay period, enforcement measures against the company's assets for debts incurred before the judgment opening the proceedings are suspended. Co-debtors and personal guarantors are not protected by the opening of judicial reorganisation proceedings. The court can suspend payments for up to four months (extendable to up to 12 months). There are, however, certain exceptions to this general principle as follows:

- pledges on receivables that have been specifically pledged to the benefit of third parties will not be affected by a judicial reorganisation; or
- pledges or security assignments of bank accounts and financial instruments that are subject to the Belgian Financial Collateral Law of 15 December 2004, as well as close-out netting agreements, will, in principle, not be affected by the opening of judicial reorganisation proceedings in the case of a default, and can in such context be enforced immediately.

Private judicial reorganisation proceedings, on the other hand, do not trigger an automatic stay on creditors' rights but only allow for an ad hoc stay once the proceedings are opened. If granted by the court, this ad hoc stay will only apply in relation to (some of the) creditors involved in the private judicial reorganisation procedure.

Stays of proceedings – strategy

How do creditors navigate stays in practice? How do stays generally affect their litigation strategy?

Creditors can try to avoid a stay altogether by negotiating that their claim is secured by:

- a co-debtor or a personal guarantor, which is less likely to file for insolvency (eg, a shareholder); or
- a security interest that is not impacted by a stay.

In addition, a stay does not prevent the debtor from making a voluntary payment to the extent that such payment is required for the continuity of the business or from granting the creditor a security interest. A creditor with a certain negotiating power could therefore try to improve its position in this way. A creditor may also invoke the right to set off, provided the claims are connected.

The opening of judicial reorganisation proceedings does not change the conditions of existing agreements. A supplier-creditor can, therefore, not request to be paid in full before delivery is made if this is not possible under the terms of the existing agreement.

Stays of proceedings – effect on emergence from insolvency

How do stays affect the debtor's emergence from insolvency?

In public judicial reorganisation proceedings, the automatic stay provides debtors in distress with 'breathing space' to reorganise their business by negotiating with their creditors or potentially interested buyers. During the stay, the debtor cannot be summoned in bankruptcy and its obligation to file for bankruptcy is suspended. However, the stay does not protect against debts incurred after the judgment opening the proceedings.

With respect to bankruptcy proceedings, the (temporary) suspension of enforcement of individual creditors' rights allows the bankruptcy trustee to sell (certain) parts of the insolvent company on a going-concern basis and, as such, still safeguard (a part) of the company's continuity.

Subordination and disallowance of creditor claims

Are the courts in your jurisdiction empowered to punish creditors' bad acts or inequitable conduct by pushing their claims down the priority waterfall? Can they void the claims altogether?

The court is not authorised to push creditor claims down the priority waterfall. However, in certain cases, creditors' security interests can be affected by avoidance actions. If successful, the sanction of such action is the unenforceability of the relevant security interest resulting in a (partial) downgrade of secured to unsecured claims.

In addition, a creditor's bad acts or conduct could expose a creditor to tort claims if the conditions of such liability are met.

Vote designation

Can creditors be disenfranchised based on bad-faith conduct?

A creditor's bad-faith conduct does not disenfranchise creditors but can be used to demonstrate an abuse of rights by the creditor. In Belgian law, the theory of abuse of rights allows the court to place limitations on the exercise of a right that has been abused and may even refuse the exercise of that right altogether. This is, for example, the case when the use of the right is made with the sole intention of harming someone or when the use is disproportionate. A creditor's bad-faith conduct may also give rise to liability if the conditions thereto are met.

PRE-INSOLVENCY DEBTOR CLAIMS

Available claims

To what extent can claims existing before insolvency be pursued against shareholders and their affiliates and agents during an insolvency proceeding – including any contractual, tort and misfeasance claims and claims for the recovery of company property?

An insolvency procedure shall, in principle, only impact a creditor's claim against the debtor itself. As such, the opening of insolvency proceedings does not prevent creditors from pursuing claims against shareholders and their affiliates or agents, nor are any specific elements required for such claims to succeed.

Procedure and resolution

What procedural mechanisms and issues should be considered when bringing pre-existing claims? How are they usually resolved?

As such, there are no procedural specificities to bringing pre-existing claims. In the event a defendant is declared bankrupt during an ongoing litigation, the creditor-claimant must file its claim in the bankruptcy proceedings. If the bankruptcy trustee accepts the claim, the litigation becomes without object and will be discontinued. If, on the other hand, the claim is disputed, the bankruptcy trustee must continue the court proceedings.

Standing and assignment of claims

Who controls the pursuit of pre-insolvency debtor claims? Can creditors or other stakeholders pursue them derivatively if the debtor or trustee refuses to do so?

The purpose of bankruptcy proceedings is to place the debtor's assets under the trustee's jurisdiction, who is charged with managing and liquidating the assets and distributing the proceeds to creditors. As a result, it is no longer possible for the debtor to act as a plaintiff in proceedings that involve the assets over which the management has been transferred to the trustee. It is up to the trustee to decide to continue (or initiate) court proceedings. Under

judicial reorganisation proceedings, on the other hand, the debtor remains in possession. Therefore, pre-insolvency debtor claims are, in principle, managed by the debtor itself, except if the court would have appointed a judicial administrator.

Although pre-insolvency debtor claims will thus, in principle, be managed by the trustee or the debtor itself, Belgian law knows a general legal mechanism under which creditors can pursue claims of their debtors when the latter is reluctant to do so. In that event, the claims are, however, brought on the debtor's behalf, meaning that the proceeds accrue to the debtor's assets and will thus not be directly distributed to the creditor who initiated the proceedings. Although the application of this legal mechanism is generally accepted in the event of judicial reorganisation proceedings, it is disputed in the event of bankruptcy.

Risk mitigation for creditors

How can creditors mitigate the risk that pre-insolvency debtor claims and remedies will be successful?

Like the bankrupt company, a creditor may also avail itself of all remedies and defences available in the pre-insolvency context. A well-drafted agreement may give the creditor additional contractual rights, such as the right to set off, to terminate the agreement or to claim default interest or damages in case of an event of default, which typically includes the opening of an insolvency procedure.

To mitigate the risk of avoidance action claims for pre-insolvency acts, creditors are advised to properly document the circumstances and considerations of all parties entering into transactions with a (potential) debtor in distress.

Minimising costs for creditors

How can creditors reduce the costs of litigation associated with these claims? What procedures are commonly used?

The main way creditors can try to reduce the cost of litigation is by entering into settlement discussions with their debtors. Whether that is an opportune strategy will, of course, depend on the circumstances, in particular the creditor's prospects for recovery and its position within the ranking of claims. The parties can also jointly appoint an independent and neutral mediator to assist them in the settlement discussion process.

OTHER CLAIMS

Other claims against creditors

Are there any other major categories of claims that may be pursued against creditors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

No.

Other claims against debtors

Are there any other major categories of claims that may be pursued against debtors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

No.

CROSS-BORDER PROCEEDINGS

Parallel proceedings and international judgments

Are parallel proceedings and international judgments recognised in your jurisdiction? What are the requirements for recognition? Can recognition be challenged? On what grounds?

Recognition of court decisions from courts of EU member states (except Denmark) is subject to the EU Insolvency Regulation (EU) 2015/848 dated 20 May 2015. This Regulation provides for an automatic recognition of court decisions in any EU member state (except Denmark). Recognition can only be challenged if the effects thereof would be manifestly contrary to the public policy of the member state where recognition is sought.

Recognition of court decisions from courts located in a non-EU member state (or in Denmark) is subject to the general rules of the Belgian Code of Private International Law. Main insolvency proceedings are recognised if they are opened in the country of the main establishment. Secondary insolvency proceedings are recognised if they are opened in the country where the debtor has an establishment. In the latter case, recognition applies only to assets located in the State where the proceedings were opened at the time of opening. In addition, recognition can be challenged on the following general grounds:

- recognition would be contrary to Belgian public policy;
- the rights of defence were violated;
- the decision was only obtained to evade the application of the law designated by the Belgian Code of Private International Law;
- the decision is still subject to an ordinary recourse;
- the decision is irreconcilable with a Belgian decision or with an earlier decision of another country and this decision is amenable to recognition in Belgium;
- the claim was brought first in Belgium between the same parties and involving the same cause of action and is still pending;
- the Belgian courts had exclusive jurisdiction;
- the jurisdiction of the foreign court was only based on the presence of the defendant or of goods; or
- the decision violates the rights of the parties according to the conflict of laws rules that are applicable to certain claims according to the Belgian Code of Private International Law (eg, set-off, retention of title or claims for fraudulent conveyance).

Judicial cooperation

To what extent if any will there be judicial cooperation with other courts in relation to insolvency proceedings?

The EU Insolvency Regulation (EU) 2015/848 dated 20 May 2015 explicitly provides for judicial cooperation. More specifically, cooperation may take place by any means the court deems appropriate. In particular, it may concern:

- coordination in the appointment of insolvency officers;
- communication of information by any means the court deems appropriate;
- coordination of the management and supervision of the debtor's property and business;
- coordination of hearings; and
- coordination of the adoption of protocols.

REMEDIES AND ENFORCEMENT

Remedies for debtors

What legal remedies are broadly available to successful debtor-claimants? Have the courts awarded any notable remedies recently?

Successful debtor claims generally follow the same rules as before insolvency, meaning that the same available remedies apply. In other words, depending on the claim at hand, the debtor-claimant may seek specific performance, damage, injunctive and declaratory relief. Courts may also impose penalty payments where possible.

Remedies for creditors

What legal remedies are available to successful creditor-claimants? Have the courts awarded any notable remedies recently?

Creditors will aim to obtain recognition of their claims in the insolvency proceedings (which may include, inter alia, damages and interest) and to receive appropriate payments from the bankruptcy estate. However, just as with successful debtor claims, creditor claims follow the same rules as before the insolvency, meaning that all remedies may also apply depending on the claim at hand. Courts may also impose penalty payments where possible.

Court enforcement mechanisms

What tools are available to the court to enforce its rulings? Are there any jurisdictional limits to the court's enforcement powers?

A first instance judgment is, in principle, enforceable despite appeal. A bailiff can exercise an attachment on movable or immovable property, or a garnishment based on such judgment.

As the case may be, a successful claimant will, however, need to take into account the consequences of a stay. Whether the judgment could be enforced abroad, will essentially depend on the rules of private international law of the state where enforcement would be sought.

SETTLEMENT AND MEDIATION

General court approach

Are the courts in your jurisdiction generally amenable to settlements?

Yes. For example, the Belgian Code of Economic Law explicitly provides the possibility for a debtor to request the court to appoint a court-mandated mediator to facilitate the reorganisation of all or part of its assets or activities.

Timing

When in the course of litigation are settlements most likely to be sought out?

Parties may enter into settlements at any stage before or after the introduction of the merits court proceedings, including on appeal, and before or after the opening of formal insolvency proceedings. The timing of parties' willingness to settle highly depends on the circumstances of the matter and the disputed claims.

Court review and approval

How do courts review settlements? What is the legal standard for entry into and approval of a settlement?

Bankruptcy trustees can only enter into settlements of disputes concerning the bankruptcy estate with the prior authorisation of the supervisory judge. If the value of the subject-matter of the settlement exceeds €50,000, the settlement can only become binding after being homologated by the court. The bankruptcy trustee must summon the debtor so that he can be heard, but the debtor has no veto power.

Mediation clauses

Will courts enforce mandatory or voluntary mediation clauses in pre-existing contracts?

If a mediation process has been initiated before the opening of the bankruptcy proceedings, the creditor-claimant must file its claim in the bankruptcy proceedings. If the bankruptcy trustee accepts the claim, the mediation becomes without object and will be discontinued. If, on the other hand, the claim is disputed, the case will be heard by the bankruptcy court. The creditor and the bankruptcy trustee may, however, in common agreement decide to continue the mediation process. The court can, however, not force the parties to enter into or continue

a mediation process as mediation is voluntary and hence requires the consent of both parties to the dispute.

UPDATE AND TRENDS

Recent developments

What have been the most notable recent developments in insolvency litigation in your jurisdiction, including any key cases and legislative changes?

On 1 September 2023, the reformed Belgian insolvency framework entered into force. This reform amends Book XX of the Code of Economic Law by introducing new reorganisation proceedings and amending the conditions for the application of certain existing procedures. This reformed framework implements Directive (EU) 2019/1023 on restructuring and insolvency in Belgium.

Some of the most significant novelties are as follows:

- Increased flexibility for (out-of-court) amicable settlements.
- Introduction of a new 'private' (or confidential) judicial reorganisation proceeding to allow the debtor to faster obtain an agreement with creditors on all or part of its debt without any general publicity of the opening of such procedure.
- The introduction of a new regime for collective restructuring plans if the debtor is a large company (or SME which opted in). Under this new regime – if strict conditions are met - the rights of secured creditors may be subject to a haircut. Also, the use of a debt-to-equity swap is facilitated by allowing shareholders to be included in a collective restructuring plan.
- Introduction of a confidential bankruptcy preparation procedure ('pre-pack') that allows insolvent companies to discreetly prepare for the transfer of assets and activities under court supervision before formal bankruptcy proceedings are opened.