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ARTICLE

The Recent Reforms in and Modernisation of Belgian Insolvency Law

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Synopsis

The Belgian government has recently taken several steps to modernize and simplify Belgian insolvency law, with a view to increasing the effectiveness of (Belgian and cross-border) insolvency proceedings. The result is a comprehensive set of updated insolvency rules in one single Code, an enhanced protection of certain creditors, a digitalization of the proceedings and a strengthened out-of-court restructuring process.

Introduction

During the past couple of years, the Belgian legislator has taken several steps towards a modernisation of Belgian law. The examples are numerous.

Starting from October 2015, six so-called *Potpourri* bills have changed provisions of our judicial code, codes of criminal (procedural) law, and the organisation of our judiciary system. With the Pledge Act of 11 July 2013 (which entered into force on 1 January 2018), the Belgian legislator (finally) updated our Napoleonic system of security interests. The Pledge Act introduced amongst others a non-possessory pledge and an online register for the registration of security interests (inspired by the UCC-1 filings in the United States). On 4 June 2018, our Government submitted a draft bill with Parliament for the reform of the Belgian companies code and rules on non-profit organisations. Draft bills that will fundamentally change our Civil Code are on their way, as well.

Belgian insolvency law could not be left behind. The legislator consulted several experts with a view to updating the rules on bankruptcy (governed by the Bankruptcy Act of 8 August 1997) and judicial reorganisation proceedings (governed by the Act of 31 January 2009 on the continuity of enterprises). These consultation efforts resulted in the new Insolvency Act of 11 August 2017, which entered into force on 1 May 2018.

This article intends to give the reader a short insight in some of the innovations implemented by the new Insolvency Act, which can be summarised as follows:

- A reinforcement of the provisions relating to out-of-court restructuring agreements (as an alternative to a pre-pack bankruptcy);
- A digitalisation of the entire insolvency procedure;
- A broader scope *ratione personae* for the application of insolvency proceedings, to meet economic realities;
- An increased protection of secured and enforcing creditors that are faced with insolvent debtors; and
- A comprehensive set of rules on directors' liability in case of insolvency.

Marginal note: the types of insolvency under Belgian law

Belgian insolvency law knows two types of insolvency proceedings, namely a bankruptcy and a judicial reorganisation procedure. The purpose of each procedure is different.

Bankruptcy proceedings aim at liquidating the company, and focus on the realisation of the underlying business or assets by a bankruptcy trustee to the benefit of the bankrupt's creditors.

Judicial reorganisation proceedings aim at rescuing the company. The aim is to preserve the continuity of all or part of the undertaking. It grants the undertaking protection against (certain enforcement measures by) its existing creditors, and the debtor in possession is given the opportunity to either negotiate an amicable or collective reorganisation agreement with its creditors, or to transfer (all or part of) the undertaking's activities to one or more third parties.

Pre-pack or silent bankruptcy cut short by the ECJ *Smallsteps* decision

The initial draft bill contained provisions which introduced a pre-pack (or silent bankruptcy) procedure in the Belgian insolvency landscape. This provision was inspired by a Dutch law proposal, and gave a debtor (who considered himself to meet the conditions for bankruptcy) the possibility to request the appointment of a pre-bankruptcy trustee and a supervising judge-commissioner by the commercial court.

The pre-pack bankruptcy was intended to help the debtor secretly prepare a bankruptcy, with a view to enabling a quick relaunch of the undertaking's profitable activities during a subsequent official bankruptcy procedure. The three-day 'silent phase' preceding the public bankruptcy process would limit disruptions that generally accompany a publicised bankruptcy, preserve employment as well as the value of the undertaking.

Insolvency practitioners were very hopeful and generally applauded this innovation. With the Brexit in mind, Belgium – the heart of Europe – could soon present a viable alternative to the UK scheme of arrangements. This hope was further increased since an amendment was submitted with Parliament, thereby taking the trade unions' criticisms on board.

The ECJ *Smallsteps* decision of 22 June 2017, rendered right before the Parliament's vote on the new Insolvency Act, threw a spanner in the works. In a previous ICR issue, our Dutch colleagues already discussed the content of said ECJ decision.[1] To summarise, the ECJ ruled that the Dutch pre-pack should not be qualified as a liquidation procedure; therefore the rules that protect the workers' rights (such as Directive 2001/23) applied. Shortly after the *Smallsteps* decision, the Belgian Minister of Justice declared in the newspapers that he saw no other option than to delete the relevant pre-pack provisions from the draft bill. The draft bill was subsequently voted upon and accepted in July 2017, albeit without the long expected pre-pack.

Alternatives to the pre-pack under Belgian insolvency law

Does this take away the possibility for Belgium to compete with other jurisdictions as concerns out-of-court restructurings? We do not believe so, as the new Insolvency Act does contain provisions to reinforce and further professionalise the existing out-of-court restructuring process.

Firstly, upon the request of any debtor, a court may appoint a 'company mediator' to facilitate the reorganisation of the debtor's activities. The existence of a formal (and thus publicised) reorganisation procedure is not required for such appointment, so that the mediator can confidentially aid the company in its restructuring process. The mission of the mediator will be determined by the debtor and the court. The end goal is to come to an amicable agreement with (at least two) creditors.

Secondly, and bearing in mind the 12 March 2014 recommendation of the European Commission,[2] the Belgian legislator has reinforced the existing provisions on the out-of-court amicable agreement. These provisions allow a debtor to conclude a contractual agreement with two or more of its creditors, in which parties agree on measures to restore the debtor's financial situation (e.g. extension of payment terms, conversion of claims into shares, etc.). The fact that at least two creditors need to take part in such amicable agreement guarantees mutual control and reduces unbalanced favoritism to the benefit of one single creditor. The law further requires the amicable agreement to include confidentiality and unseverability clauses, which – according to the legislator – stresses the goal of the agreement: 'a discrete (but without fraud) and voluntary shared strategy between reliable partners to save the undertaking.'

The benefit of such amicable agreement is that voidable preference rules do not apply in a subsequent bankruptcy, should the agreed reorganisation measures fail to be successful (except in case of fraud). Also, the parties may request the intervention of a court to confirm the amicable agreement and declare it enforceable. The court may not scrutinise the content of the agreement, and must limit itself to a formal control.

The digitalisation of Belgian insolvency proceedings

Prior to April 2017, obtaining information on Belgian bankruptcy proceedings was quite cumbersome. An extract of the court's bankruptcy order was published in the Belgian State Gazette, but for additional information (such as the reports of the bankruptcy trustee on the status of the proceedings) a creditor had to visit the bankruptcy court's registrar (in person or represented by a lawyer). Also, a creditor's filing of claim in the bankrupt's estate could not be done via e-mail; the creditor had to file a hard copy of the declaration (with the documents in support of its claim) with the court's registrar.

As part of its efforts to digitalise and reduce the costs of our judiciary and legal system, the Belgian legislator passed a law on 1 December 2016 for the incorporation of a Central Solvency Register. The register effectively went online in April 2017 (www.regsol.be). It is a digital databank in which, at first, only certain documents with respect to bankruptcy proceedings were uploaded and centralised. Creditors could also digitally file their claims for a low fee of 6 EUR, and even interested third parties could request access to the bankruptcy file.

The new Insolvency Act further has now expanded the scope of the register to all insolvency proceedings, including restructuring proceedings. Transparency and efficacy has also increased, as the entire insolvency procedure is now digitally available (going from an

Notes

1 See ICR 2017, issue 6, volume 14, pp. 397-400.

2 2014/135 EU Recommendation of 12 March 2014 of the European Commission on a new approach to business failure and insolvency, Pb. L. 74, pp. 65-70.

overview of the assets and liabilities of the bankrupt company, to reports and court petitions filed by the trustee in bankruptcy). Certain important notifications and communications to the parties involved can also be done through the register's communication channels.

Some documents will remain 'off register', and will be kept at the bankruptcy court's registrar. If the trustee contests another creditor's claim in the bankruptcy, this will be reflected in the trustee's report. However, the court documents as regards the proceedings on the merits (e.g. the trial briefs) are not available to the other creditors through the register; the trustee shall only upload the judgment on the merits.

The scope *ratione personae* of insolvency proceedings has been broadened

One of the most remarkable innovations of the new Insolvency Act, is that the legislator has broadened the scope *ratione personae* of our insolvency law, through the introduction of a new definition of an 'undertaking'.

Under the old regime, only 'merchants' or 'traders' could be declared bankrupt, and no bankruptcy regime was available to e.g. lawyers, architects, who – according to Belgian case law – were not considered to be merchants. Also, the definition of an undertaking under the old Bankruptcy Act differed from the definition used in the Act on the continuity of enterprises, so that some undertakings only had access to one of these insolvency proceedings. The legislator realised that the economic reality required a new and uniform definition of an undertaking.

The new Insolvency Act uses a broader definition of undertaking that is no longer restricted to commercial companies and traders only; it now includes all forms of organisations. The following categories are considered undertakings and thus fall within the scope of Belgian insolvency law:

- All self-employed natural persons that conduct professional activities, e.g. lawyers, Uber drivers, Airbnb hosts, but also directors of a company;
- Subject to the specific exceptions (e.g. legal person governed by public law), all legal persons governed by private law (i.e. companies, non-profit organisations, foundations, co-owner associations, etc.);
- All other organisations without legal personality that are profit seeking, or aim at distributing funds to their stakeholders, such as foreign trusts. This rather vague category will, in our opinion, raise several issues. Indeed, these organisations often do not have their proper balance sheet and have no legal capacity to be summoned before courts. If such organisation is involved in an insolvency procedure, this will most probably require the individual members to be joined or subjected to a separate insolvency procedure.

An increased protection for secured creditors that commenced enforcement proceedings

Under the old regime, the mere filing of a petition for judicial reorganisation by a debtor suspended all enforcement measures taken by creditors. The protection existed, irrespective of whether the petition was later on found with or without merits by the court. This resulted in debtors filing a petition for creditor protection, each time a creditor commenced enforcement on the debtor's movable or immovable assets. Hence, the enforcing creditor often had to wait and recommence the costly and very formalistic enforcement procedure after the lapse of the (doomed to be unsuccessful) stay.

The legislator wanted to bring a stop to maneuvers that were taken in bad faith, solely with a view to delaying and frustrating the enforcement actions taken by creditors.

The new Insolvency Act has introduced mechanisms to protect a creditor who commenced enforcement proceedings, depending on the stage of the enforcement process. For example, if a creditor is enforcing on a debtor's real estate and the public sale is scheduled to take place within the next two months, then the commencement of a reorganisation procedure no longer halts the auction. In very exceptional circumstances, and only after having heard the enforcing and other creditors, a court may stay the enforcement. The debtor will, however, need to deposit an amount to cover the enforcement costs made.

A comparable protection exists to the benefit of an enforcing creditor that is suddenly confronted with a bankruptcy of its debtor. The legislator also strengthened the position of a first ranking mortgagee in case of a bankruptcy; the latter may continue enforcement of the debtor's real estate notwithstanding bankruptcy after a short standstill of (usually) one month.

By way of final remark, the legislator also jumped on the digitalisation train as concerns public sales of real estate. The new Insolvency Act gives the notary public (who has a monopoly for the public sale of real estate) the possibility to organise an online auction. Thereto, a new website was launched per 1 May 2018, which is expected to be fully operational by 1 September 2018 (www.biddit.be). The legislator hopes that an online auction allows the notary public to reach more potential bidders, to the benefit of the (enforcing) creditors.

Comprehensive set of rules on directors' liability in case of insolvency

Directors can, in general, be held liable (i) as an agent of the company, on a contractual basis, (ii) for violations of the company's articles of association or the Belgian Companies Code, or (iii) on the basis of tort. In

addition thereto, specific grounds for director's liability existed in case of insolvency, but these rules were scattered around and could be found e.g. in the Companies Code, but also in our Tax Codes.

With the new Insolvency Act, the legislator wanted to consolidate all rules on directors' liability in case of insolvency. The aim was to have one comprehensive and consistent set of rules, all listed in Book XX ('Insolvency of Undertakings') of our Code of Economic Law.

The legislator also codified the so-called directors' liability for wrongful trading (which in practice was already applied by Belgian courts, albeit under the denominator of gross and manifest negligence). In the event of a bankruptcy, a company's director, former director, managing director 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, if, to summarise:

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

As mentioned above, our draft bills on the change of our Companies Code have been submitted with Parliament. Although this falls outside the scope of the current article, it is worthwhile mentioning that the draft bills (in their current form, and subject to further amendments) introduce caps on a director's personal liability. No longer will such liability be unlimited, and the proposed caps are in function of the size of the bankrupt company.

Conclusion

The recent reforms of Belgian insolvency law have, so far, received positive reviews, both from legal practitioners as well as interest groups and the business. These reforms modernise and simplify the insolvency proceedings. We believe that the current reforms strengthen the Belgian legal regime and the existing equitable balance between creditors and debtors' rights. Although some sighs were not addressed and further amendments are to be expected, we do believe that the legislator has taken a huge jump forward to an understandable, modern, and coherent insolvency regime.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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